



2011

Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law

Johanna E. Bond

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yhrdlj>



Part of the [Human Rights Law Commons](#)

Recommended Citation

Johanna E. Bond, *Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law*, 14 YALE HUM. RTS. & DEV. L.J. (2011).

Available at: <https://digitalcommons.law.yale.edu/yhrdlj/vol14/iss1/1>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Human Rights and Development Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Article

Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law

Johanna E. Bond[†]

This is an explosive time for those seeking to define the meaning and parameters of marriage. The subject has generated heated debate worldwide. In June 2010, the European Court of Human Rights declined to extend marriage rights to a gay Austrian couple, but the Court carefully laid the foundation for the recognition of such rights when a European consensus on the issue emerges. In July 2010, Argentina extended to same-sex couples the right to marry, joining nine other countries that legally recognize same-sex couples' right to marry. In August 2010, a United States district judge struck down a California ban on same-sex marriage. Marriage, as a legal status and a social construct, continues to evolve.

In recent years, some theorists have questioned the continued salience of marriage as a legal category and advocated a minimal role for the state in marriage regulation. Those challenging marriage as an institution and the state's role in marriage regulation do so for legitimate and compelling reasons, primarily related to the role of the institution in perpetuating sexism and heterosexism. This Article is the first to explore the transnational applicability of this critique of marriage. In light of this critique, the Article interrogates the role of the state in marriage regulation in the particular context of Commonwealth African states. In contrast to those arguing for a limited or nonexistent role for the state in the ordering of private, intimate relationships, the Article argues strongly for expanded, rather than reduced, state intervention in marriage. Robust state regulation will promote equality within individual relationships and

[†] Associate Professor of Law, Washington and Lee University School of Law. For their insightful comments on earlier drafts of this Article, special thanks go to participants in the Lat-Crit XIV Works-in-Progress Panel, Junior International Law Scholars Association, the William and Mary Faculty Workshop Series, the Southeastern Association of Law Schools Family Law Panel, Elizabeth Bruch, Vivian Hamilton, J.D. King, and Adrien Wing. For their excellent research assistance, I also thank Kelsey Baughman, Meredith Conrad, Massie Payne, Emily Sowell, and Kristin Stewart.

among relationships, including same-sex relationships.

The Article proposes a three-part strategy for promoting equality in marriage. First, states with plural legal systems, such as those in Commonwealth Africa, should preserve the plural legal architecture of marriage but integrate the relevant laws by establishing a legislative core of rights within marriage. Second, states should promote equality among intimate relationships by building on the existing marriage “menu” options, adding options for same-sex couples when the political climate is ripe for such reform. Third, states should explore traditions and customary law that support broader understandings of family and caregiving, moving the focus of family law beyond the heterosexual spousal dyad.

INTRODUCTION

Marriage matters. In recent years, activists and scholars from all over the world have challenged the traditional parameters of marriage, questioning eligibility requirements and legal benefits that arise from marriage.¹ Some advocate for the elimination of marriage as a legal status while others argue for the expansion of marriage rights to same-sex couples.² Both proposals have generated significant controversy and called into question the role of the state in marriage regulation. A number of theorists in the global North argue that reducing the state’s role in marriage regulation, or eliminating it altogether, will promote equality for women and same-sex couples. This Article is the first to explore the transnational application of these important theoretical contributions. The Article assesses the role of the state in marriage regulation in the context of Commonwealth African states and concludes that robust state intervention in marriage has the greatest potential to promote equality within and among families.

1. Dorian Solot & Marshall Miller, *Taking Government Out of the Marriage Business*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 70, 71 (Anita Bernstein ed., 2006) (“[T]he state acts as a hands-off licensing bureau and divorce granter, making marriage relatively easy to enter and exit, yet maintaining legal marital status as a key determinant of eligibility for more than one thousand federal rights and obligations. Cultural lag in family law leaves other kinds of family relationships dangerously ignored and penalized.”).

2. See, e.g., Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS, *supra* note 1, at 29; Samuel A. Marcossou, *Multiplicities of Subordination: The Challenge of Real Inter-Group Conflicts of Interest*, 71 UMKC L. REV. 459, 460 (2002) (“[T]here has been an active campaign by LGBT activists to expand the institution of civil marriage to include equal recognition of the marriages between same-sex partners.”); Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for “Opposite-Sex Only” Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114, 132 (2003) (“Abolishing marriage, however, is a meritorious means to a just end. Viewed in light of the struggle for [] equal rights . . . abolition of the legal institution of marriage equalizes these members of society in ways that same-sex marriages and ‘civil unions’ will not.”).

For the vast majority of women in Commonwealth Africa,³ marriage determines social acceptance, financial well-being, and even physical health.⁴ Despite the centrality of the institution, women enjoy vastly different rights within marriage depending upon whether the couple marries according to statutory law, customary law, or religious law.⁵ The level of state intervention in marriage depends, in large part, on the type of marriage into which a couple has entered.⁶ Civil or statutory marriage suggests a high level of state control while the state cedes to local communities much regulatory control over customary and religious marriages.

Although some feminists have recently argued that the state should not be involved in the regulation or promotion of marriage, the state has a critical role to play in the protection of women's rights within marriage. The state has an obligation to promote equality both *within* and *among* intimate relationships.⁷ The state's obligation to promote equality within relationships involves the promotion of gender equality within individual relationships. The obligation to promote equality across or among relationships concerns the state's exclusion of certain types of relationships, such as same-sex relationships, from state recognition. In the Commonwealth African context, this dual obligation is best served not by less regulation, as some would argue – but by more.

This Article provides an overview of marriage in Commonwealth African countries, explores the underlying values that animate reform of the plural legal systems in these countries, and offers a justification for contemporary state intervention in the customary marriage regime. The Article explores the argument of some Western feminists that the role of the state in marriage regulation is obsolete⁸ and considers the saliency of this

3. The African countries in the Commonwealth include: Botswana, Cameroon, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe (although Zimbabwe withdrew in 2003). Although it does not share the same colonial history, Mozambique was included in the Commonwealth as a "special case." See *Member States*, COMMONWEALTH SECRETARIAT, <http://www.thecommonwealth.org/Internal/191086/142227/members/> (last visited Feb. 21, 2011). This broad array of countries varies in history, laws, cultures, languages, economics, and politics, to name a few. Although these differences make generalizations difficult, most of the countries share some characteristics in terms of the interaction between statutory law and customary law in the marriage context.

4. See generally VOICES OF AFRICAN WOMEN: WOMEN'S RIGHTS IN GHANA, UGANDA, AND TANZANIA (Johanna Bond ed., 2005).

5. See generally Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L. J. 259 (2001).

6. See Catherine A. Hardee, *Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law*, 79 N.Y.U. L. REV. 712, 721 (2004) ("Each type of marriage is different with respect to the amount of control the national government exerts in defining both the substance and procedures of the marriage contract.").

7. This Article builds upon the theoretical contributions of Linda McLain and others who have characterized the state's responsibility as involving equality promotion both within and across intimate relationships. See Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379, 383 (2003).

8. See, e.g., TAMARA METZ, UNTYING THE KNOT (2010); Fineman, *supra* note 2, at 29.

contention within the plural legal systems of Commonwealth Africa. Although these arguments are an important and compelling part of the discourse on women's and LGBT rights in the global North, they are less persuasive in the particular context of Commonwealth Africa.

Part I of this Article identifies the characteristics of Commonwealth African marriage within plural legal systems, including rights to enter into marriage, rights within marriage, and rights at dissolution of marriage. This description of the contours of marriage provides a backdrop against which to measure the intransigence of gender roles and to assess the state's role in challenging and transforming those roles. I do not intend to describe Commonwealth African marriage in great detail here. To do so would be impossible given the myriad variations on customary, religious, and even statutory marriage laws. Customary marriage law, for example, varies not only within countries but also among ethnic groups and even, at times, among villages.⁹ My goal in this section is rather to sketch the parameters of marriage under different marriage regimes, primarily customary and statutory law. Although marriage under religious law, including Islamic and Hindu laws, forms an important part of the marriage mosaic in Commonwealth Africa, this Article focuses largely on comparisons between customary and statutory marriage.¹⁰ This section highlights the ways in which customary marriage law discriminates against women.¹¹

Part II explores the values that have shaped the evolution of marriage law within plural legal systems, including the impact of colonialism, the desire to preserve culture and tradition, the desire to promote women's equality within the family, and the recognition of choice in governing marriage law. As I have argued elsewhere, the discourse on gender equality in the region must engage both the promotion of equality rights and the preservation of custom.¹² These dominant frames provide the

9. See, e.g., Ephraim N. Ngwafor, *Cameroon: The Law Across the Bridge: Twenty Years (1972-1992) of Confusion*, 26 REVUE GÉNÉRALE DE DROIT 69, 75-76 (1995) ("Although there is some resemblance in these various tribes, each tribe has a unique set of customary laws."); Abby Morrow Richardson, *Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, HUM. RTS. BRIEF, Winter 2004, at 19, 20 ("Customary law and practices vary from tribe to tribe, and also within tribes, but are largely based on similar social principles.").

10. For more information regarding marriage under Islamic law within the region, see 2 ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURES (Suad Joseph et al. eds., 2005); WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM (Lynn Welchman ed., 2004).

11. See, e.g., Chuma Himonga, *Transforming Customary Law of Marriage in South Africa and the Challenges of Implementation with Specific Reference to Matrimonial Property*, 32 INT'L J. LEGAL INFO. 260, 262-263 (2004) ("[M]uch of customary law, including the law of marriage, is riddled with rules and practices that discriminate especially against women.").

12. See Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L. J. 289 (2008) [hereinafter Bond, *Constitutional Exclusion*]; Bond, *Gender, Discourse, and Customary Law in Africa*, 83 S. CAL. L. REV. 509 (2010) [hereinafter Bond, *Gender, Discourse*]; see also Penelope E. Andrews, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 2009 UTAH L. REV. 351, 354 (2009); David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Customary and Statutory Adjudication in*

foundation for any discussion of women's rights within the family in Commonwealth Africa.

Part II also interrogates the plural legal system as a possible site for the exercise of women's agency in the choice of governing marriage law. Within the plural legal systems of Commonwealth Africa, statutory marriage regimes can offer women a more equitable, though imperfect, alternative to the relevant customary or religious marriage law.¹³ Within these plural systems, women have the option to marry according to statutory law, an option that allows some women to exercise agency in protecting their own rights within the marital relationship.¹⁴ Eliminating the state's role in marriage or eliminating marriage as a legal category in the Commonwealth African context would simply narrow the range of marriage options for women. Given the entrenched attachment to marriage in the region, rates of customary marriage would rise, reducing the opportunity for women to choose a marital regime that is more hospitable to women's rights while preserving traditional notions of marriage. By offering a civil law alternative to traditional marriage, the state plays a crucial role in protecting the exercise of women's agency in the choice of governing marriage law. Although the patriarchal social context of the family constrains women's ability to exercise that choice, the existence of a more equitable statutory alternative to traditional, customary marriage also serves an expressive function. The statutory alternative, even if selected by a minority of marrying couples in the region, expresses the state's normative commitment to women's rights within the family.

In Part III of the Article, I advocate preserving a role for the state in marriage regulation in Commonwealth Africa on two primary grounds. First, the state has an obligation to promote gender equality *within* relationships.¹⁵ The state must take seriously its international human rights obligations to intervene in marriage. Abrogation of the state's role in marriage regulation would, in fact, contravene human rights obligations. Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), for example, requires States parties to actively engage in the promotion of equality within marriage.¹⁶ It would be impossible for a state to fulfill this obligation if it abdicated responsibility over marriage regulation or constructed a minimal role for

Mozambique, 14 YALE HUM. RTS. & DEV. L.J. 59 (2011).

13. See EUNICE M. IIPINGE & DEBIE LEBEAU, BEYOND INEQUALITIES 2005: WOMEN IN NAMIBIA 10 (2005) ("The Married Persons' Equality Act (No. 1 of 1996) specifies equality of persons within marriage and does away with the legal definition of the man as head of the house. . . . However, the Act only covers couples married under civil law . . .").

14. A woman's ability to exercise this agency, however, is constrained by the patriarchal social context of the family. See *infra* notes 261-66 and accompanying text.

15. For one state's approach to the promotion of equality within relationships, see LAW COMM'N OF CAN., BEYOND CONJUGALITY 122 (2001); see also Linda C. McClain, *What Place for Marriage (E)quality in Marriage Promotion?*, in MARRIAGE PROPOSALS, *supra* note 1, at 106, 107.

16. Convention on the Elimination of All Forms of Discrimination Against Women, art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13, 18 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

state intervention within marriage.

Second, the state has a role to play in the protection of equality across relationships. To this end, the state must protect not only heterosexual unions but those in same-sex relationships as well.¹⁷ The global landscape of rights protection across relationships is evolving. In June 2010, the European Court of Human Rights issued a judgment stating that the Austrian government was not required to extend marriage rights to same-sex couples. Importantly, however, the Court indicated that it might someday require that states recognize the marriage rights of same-sex couples if and when a European consensus emerges.¹⁸ In a surprising development in July 2010, Argentina, a majority-Catholic country, recognized same-sex couples' right to marry.¹⁹ Argentina joins Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden in legally recognizing the marriage rights of same-sex couples.²⁰ In August 2010, a federal judge in the United States struck down a California law banning same-sex marriage.²¹ A number of other countries across the globe fall short of providing marriage rights but extend protection to civil partnerships or other forms of same-sex unions.²²

Despite the nascent trend toward state recognition of marriage rights for same-sex couples, feminists and LGBT activists are divided as to whether to embrace or reject marriage as an institution.²³ In this context, a

17. See THE YOGYAKARTA PRINCIPLES, Principle 24 (2007), http://www.yogyakartaprinciples.org/principles_en.pdf ("States shall . . . [t]ake all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners. . . ."); see generally William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (providing an overview of the history of same-sex marriage).

18. *Schalk v. Austria*, App. No. 30141/04, ¶¶ 46, 58 (Eur. Ct. H.R. June 24, 2010), available at http://www.menschenrechte.at/uploads/media/Schalk_und_Kopf_gg_OEsterreich_Urteil_01.pdf ("In the absence of consensus, the State enjoyed a particularly wide margin of appreciation. . . . [T]he Court notes that there is no European consensus regarding same-sex marriage.").

19. Luisita Lopez Torregrosa, *In Latin America, a Harbinger of Women's Rights*, N.Y. TIMES, (July 27, 2010), <http://www.nytimes.com/2010/07/28/world/americas/28iht-letter.html> (observing that "Argentina's recent turbulent past and brutal oppression and persecution of gays and lesbians hardly foreshadowed the Patagonian nation's new global status as a champion for them.").

20. Q&A: *Argentina Gay Marriage Law*, BBC NEWS (July 15, 2010), <http://www.bbc.co.uk/news/world-latin-america-10650267>.

21. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), argued, No. 10-16751 (9th Cir. Dec. 6, 2010) (holding that a voter-enacted state constitutional amendment restricting marriage to one man and one woman violated the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution).

22. See, e.g., Elizabeth Burleson, *From Nondiscrimination to Civil Marriage*, 19 CORNELL J. L. & PUB. POL'Y 383, 394-96 (2010).

23. Fineman, *supra* note 2, at 29 (arguing for the abolition of marriage as a legal status and leaving marriage to the realm of private contract); McClain, *supra* note 15, at 106 (supporting a movement to expand marriage beyond the traditional definition of one man and one woman, recognizing same-sex marriage as well as other family arrangements); Mary Lyndon Shanley, *The State of Marriage and the State in Marriage*, in MARRIAGE PROPOSALS, *supra* note 1, at 188, 188 (asserting that the state has a legitimate role in arbitrating committed adult relationships);

number of feminists and LGBT advocates argue that the state should not privilege marriage over other types of familial relationships.²⁴ Although some LGBT advocates argue for the extension of marital privileges to those in same-sex relationships, others argue for dismantling the institution of marriage as a way to promote equality for women and same-sex couples.²⁵ Advocates of marriage deregulation suggest relegating the ordering of intimate relationships to ordinary contract law or constructing a system in which the state can register all manner of familial relationships and reward or compensate, for example, those who engage in caretaking.²⁶ This method avoids the use of a rather blunt instrument (i.e. formal marriage) as a proxy for behavior that the state would like to incentivize.²⁷ There are limitations, however, on the application of marriage deregulation in Commonwealth Africa. The arguments advanced by feminists and LGBT advocates in the global North are highly contextual. The arguments, compelling in their own context, are products of a geographic, political, and temporal reality that is not readily transferable to Commonwealth Africa.

In Part IV, the Article proposes several ways in which a Commonwealth African state might positively intervene in marriage, promoting equality both within and across relationships. Abolishing customary marriage systems is neither culturally sensitive nor feasible. Recognizing the continued purchase of customary marriage in the region, states should establish a “legislative floor” for marriage rights that applies regardless of the type of marriage into which a couple has entered. The “legislative floor” approach would standardize a minimum core of rights within marriage, such as minimum age, consent, property rights, and custody. The state would preserve aspects of customary marriage law that are valued markers of community and ethnic identity and that do not contravene the statutory standard of minimum rights within marriage. A “legislative floor” approach will allow states to preserve the positive aspects of customary and religious marriage law while reducing its discriminatory aspects.²⁸

Claudia Card, *Against Marriage and Motherhood*, 11 HYPATIA 1 (1996) (arguing that the institution of marriage is flawed and should be abolished rather than expanded to include same-sex couples).

24. Fineman, *supra* note 2, at 40 (“If we are concerned with dependency and want to ensure caretaking through social and economic subsidy of family, then why not focus on the relationship of caretaker and dependent? It is not necessary to support this unit indirectly through marriage when we can do so directly with policies that address the caretaker-dependent relationship.”).

25. See Shanley, *supra* note 23, at 188-189.

26. Solot & Miller, *supra* note 1, at 76 (“Broadly defining ‘family’ to include not only blood, marriage, and adoptive relationships but also others who operate as caretakers in a significant way on a long-term basis protects both the vulnerable and the caretakers . . .”).

27. See Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 309 (2004) (“Marriage is proposed and accepted (so to speak) by lawmakers as a proxy for socially desirable outcomes.”).

28. See generally Bond, *Gender, Discourse*, *supra* note 12 (discussing the importance of promoting equality while preserving the positive aspects of culture).

Rather than eliminating customary or religious marriage law in favor of a universal statutory option, the “legislative floor” approach maintains a plural system in which marrying couples select the governing law. Standardization of rights through a “legislative floor” approach will allow states to build upon the plural system and eventually increase the menu of options available for marriage. Removing the state from the marriage business would effectively reduce menu options by eliminating the state-sponsored statutory version of marriage. States should preserve the architecture of the plural system and, when politically feasible, increase the menu options to include civil partnerships or marriage for same-sex couples. Although distinct in its culture, politics, history, and economic status, South Africa provides a regional example of a country that has increased its menu of marriage options to include not only civil, customary, and religious marriage but also civil partnerships and marriage for same-sex couples.²⁹

Finally, states should explore areas of potential resonance between state-sanctioned values of gender equality and customary law within marriage. Customary law is dynamic; in theory, it will respond to evolving social needs and pressures.³⁰ There may be ways in which customary notions of caregiving support a broader understanding of marriage and familial roles. Caretaking responsibilities, for example, have traditionally extended beyond the spousal dyad to include extended family members.³¹ HIV/AIDS has left a startling number of children in the region without parental caregivers, leaving them in the hands of grandmothers and other extended family members.³² This de-centering of the spousal relationship within customary understandings of family may allow for an exploration of resonance between custom and contemporary critiques of the state’s privileging of individualistic, heterosexual marriage partners.

The Article strongly argues for preserving a role for the state in marriage regulation within Commonwealth Africa. This conclusion stems, in part, from the recognition that eliminating the role of the Commonwealth African state in marriage regulation would do more harm than good. In this sense, the transnational applicability of the marriage critique is limited. Feminist arguments to the contrary, although important

29. See *infra* notes 386-94 and accompanying text.

30. See Alice Armstrong et al., *Uncovering Reality: Excavating Women’s Rights in African Family Law*, 7 INT’L J. L. & FAM. 314, 327 (1993).

31. Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 232 (2008) (“[T]he costs of child rearing in the extended family model of West Africa are ‘rarely born exclusively by biological parents; rather, they are shared by many people through the extended family and other social networks.’” (quoting Rebecca L. Hegard & Maria Scannapieco, *Grandma’s Babies: The Problem of Welfare Eligibility for Children Raised by Relatives*, 27 J. SOC. & SOC. WELFARE 153, 155 (2000))).

32. Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS L. REV. 417, 447 (2007) (noting that “[e]nsuring that orphans have alternative family care arrangements (either through extended family or a state designated guardian) is an essential initial step to ensuring the well-being of the child following the loss of parents”).

and compelling in many jurisdictions, do not reflect the current reality of Commonwealth African women's lives. In this context, the state has a crucial role to play in promoting equality within and across marital relationships. Although contemporary political realities in the region suggest some limits on the state's ability to promote equality across relationships, there is considerable value in laying the foundation for future advocacy efforts. Indeed, rather than echoing Western feminists' concerns about state overreaching and intrusiveness in marriage, many African scholars lament the enervated state response to persistent inequality within and across intimate, familial relationships.³³

I. CHARACTERISTICS OF AFRICAN MARRIAGE

A. Requirements for Marriage

1. Consent and Age Requirements

Marriage under African customary law is often seen as the union between two families rather than two individuals.³⁴ As such, the customary law of some ethnic groups does not require the individual consent of the marrying woman.³⁵ In many countries, customary law considers women to be under the guardianship of their fathers before marriage and of their husbands after marriage.³⁶ A widow may live under the guardianship of her husband's customary law heir, such as her husband's brother or a male

33. See, e.g., Jacqueline Asimwe, *One Step Forward, Two Steps Back: The Women's Movement and Law Reform in Uganda from 1985-2000*, in VOICES OF AFRICAN WOMEN, *supra* note 4, at 52, 60 ("The government fears rocking the cultural boat and would rather sacrifice women at the altar of archaic and discriminatory laws."); Muna Ndulo, *The Changing Nature of Customary Marriage in Zambia*, in WOMEN AND LAW IN SUB-SAHARAN AFRICA 3, 17 (Cynthia Grant Bowman & Akua Kuenyehia eds., 2003) ("In Zambia little attention has been given to the future of customary law by the government hitherto. . . . There is an urgent need to study this problem and plot a course for the future of customary marriage law if it is to develop on sound lines.").

34. See Fitnat Naa-Adjeley Adjete, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1355 (1995) ("Marriage symbolized the uniting of two families and bolstered the prestige and security of families.").

35. See CHRISTOPHER AMHERST BYUMA ZIGIRA, RELIGION, CULTURE AND GENDER: A STUDY OF WOMEN'S SEARCH FOR GENDER EQUALITY IN SWAZILAND 79 (2003) ("A man could marry a young girl without her consent through arranged marriage, *kwendzisa*, which only required mutual agreement of the two families rather than the two persons concerned."); MERCY SIAME ET AL., BEYOND INEQUALITIES: WOMEN IN ZAMBIA 35 (1998) ("In customary marriage law, consent between the parties does not include the consent of the bride-to-be."); Karine Bélair, *Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone*, 15 COLUM. J. GENDER & L. 551, 568 (2006) ("While the consent of the wife's family is necessary for a valid marriage, that of the wife is not. Customary marriage often takes place when girls are very young. . . .").

36. See, e.g., PULENG LETUKA ET AL., BEYOND INEQUALITIES: WOMEN IN LESOTHO 20 (1997) ("Under the customary law a woman, before marriage, is under the guardianship of her father. Upon marriage she transfers to that of her husband . . .").

cousin.³⁷

These limited conceptions of women's legal capacity affect societal perceptions of women's ability to consent to marriage.³⁸ In other words, when a woman is considered a legal minor or otherwise lacks legal capacity under customary and/or statutory law, it becomes less important to seek her consent in the context of an impending marriage.³⁹ As a result, families sometimes coerce or force women and girls into marriages, sometimes with much older men.⁴⁰ In addition to explicit familial coercion, social pressure to marry is significant and acts as a powerful incentive for girls and women to accept the marriages arranged by their families.⁴¹

Under the statutory law of most Commonwealth African countries, both women and men must explicitly consent to the marriage.⁴² Nigerian statutory law, for example, defines marriage as a voluntary contract

37. This is true in patrilineal communities. *See id.*

38. *See* Marsha A. Freeman, *Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries*, 5 BERKELEY WOMEN'S L. J. 110, 112-13 (1989) ("Capacity in its more general sense refers to the ability to accept and to exercise the rights and responsibilities of an adult in one's society. . . . Ultimately, it implies a full range of choice in one's personal, social, and economic life.").

39. Some countries limit women's ability to enter into contracts and otherwise treat women as legal minors. *See, e.g.*, U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Fifth and Sixth Periodic Reports of States Parties: Kenya*, ¶¶ 101, 165, CEDAW/C/KEN/6 (Oct. 16, 2006) ("Women who are single must obtain their father's consent to obtain passports whereas those who are married must obtain their husband's consent . . . That is not extended to men in the same situation."). In Lesotho, the law recognizes a woman's legal capacity if she is over twenty-one years of age and unmarried or if she is a widow. LETUKA ET AL., *supra* note 36, at 20.

40. *See* SARAH C. MVUDUDU ET AL., LOBOLA: ITS IMPLICATIONS FOR WOMEN'S REPRODUCTIVE RIGHTS IN BOTSWANA, LESOTHO, MALAWI, MOZAMBIQUE, SWAZILAND, ZAMBIA AND ZIMBABWE 27 (2002) ("It is also open to abuse by those who stand to benefit from receiving *lobola* where young girls may be forced into early marriages and marriages to older men.").

41. *See* Margot Lovett, *On Power and Powerlessness: Marriage and Political Metaphor in Colonial Western Tanzania*, 27 INT'L J. AFR. HIST. STUD. 273, 289 (1994) ("Pressure [to marry] was brought to bear on them not only from their own families, but from the wider community as well.").

42. Typically, statutory marriage law requires the "free and full consent" of both parties to the marriage, a requirement that is often in conflict with prevailing conceptions of marriage. *Compare* U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Reports of States Parties: Namibia*, art. 16.1, CEDAW/C/NAM/1 (Feb. 10, 1997) ("Marriage may be entered into 'only with the free and full consent of the intending spouses.'"), *with id.* ("[I]n many respects these constitutional mandates are inconsistent with existing law and practices."). *See also* SWAZ. CONST. art. 27, § 2 (2005) ("Marriage shall be entered into only with the free and full consent of the intending spouses."); U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Initial, Second, Third, Fourth, and Fifth Periodic Reports of States Parties: Sierra Leone*, art. 23.2.1, CEDAW/C/SLE/5 (Dec. 14, 2006) ("Under general law, marriage is a contract and therefore, the parties (i.e. both man and woman) must agree before the marriage contract is valid."); U.N. Comm. on the Elimination of Discrimination Against Women, *Periodic Reports of States Parties: Uganda*, art. 16, CEDAW/C/UGA/3 (July 3, 2003) ("Article 31 of the Constitution . . . provides for both men and women to enter marriage of their own free consent."); U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Report of States Parties: Zimbabwe*, art. 16.1, CEDAW/C/ZWE/1 (July 20, 1996) ("Without consent of both spouses a marriage can be annulled."); Mark J. Calaguas et al., *Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania*, 16 COLUM. J. GENDER & L. 471, 496 (2007) (discussing the Tanzanian requirement of freely given consent).

between a man and a woman.⁴³ Although the statute restricts marriage to opposite-sex couples, it imposes a consent requirement designed to combat forced or coercive marriage. In addition to statutory consent requirements applicable to civil marriages, a few countries have enacted legislation extending the requirements of civil marriage, including consent, to customary marriages.⁴⁴ South Africa's Recognition of Customary Marriages Act, for example, requires consent of both spouses for legal recognition of the customary marriage, as well as that of the parents where a party is a minor.⁴⁵ In addition, Ghana's criminal code makes it a criminal offense to force another to marry.⁴⁶ In some cases, customary law has evolved to require the consent of both parties. In Ghana, Namibia, and Sierra Leone, for example, contemporary customary law requires the consent of both parties to the marriage.⁴⁷

In some African Commonwealth countries, customary law permits early marriage.⁴⁸ Although the marriage may not be consummated until a girl reaches puberty, families may promise an infant or very young daughter in marriage.⁴⁹ Parents sometimes arrange marriages that involve a young daughter and a much older man.⁵⁰ This age difference may reinforce male dominance within the marriage, limiting women's or girls' ability to negotiate safe sex practices and contributing to violence within the marriage.⁵¹

43. See Andreas Rahmatian, *Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience*, 10 INT'L J. L. POL'Y & FAM. 281, 290 (1996) ("Statutory marriage in Nigeria is a voluntarily concluded contractual union between one man and one woman.").

44. See W. TICHAGWA, BEYOND INEQUALITIES: WOMEN IN ZIMBABWE 45 (1998) (explaining that intending spouses over the age of eighteen under Zimbabwe's Customary Marriages Act no longer need parental consent); Calaguas et al., *supra* note 42, at 496 (discussing the consent provision in Tanzania's Law of Marriage Act); Himonga, *supra* note 11, at 264 (noting that in South Africa, "both parties to the marriage are now required to consent to their marriage.").

45. Himonga, *supra* note 11, at 264 (2004).

46. Bernice Sam, *Discrimination in the Traditional Marriage and Divorce System in Ghana: Looking at the Problem from a Human Rights Perspective*, in VOICES OF AFRICAN WOMEN, *supra* note 4, at 205, 206.

47. See *id.*; see also U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Initial, Second, Third, Fourth, and Fifth Periodic Reports of State Parties: Sierra Leone*, art. 23.2.2, CEDAW/C/SLE/5 (Dec. 14, 2006); U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Reports of the State Parties: Namibia*, art. 16.3, CEDAW/C/NAM/1 (Feb. 10, 1997).

48. See Athena D. Mutua, *Gender Equality and Women's Solidarity Across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process*, 13 WM. & MARY J. WOMEN & L. 1, 27 (2006).

49. See Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER SOC. POL'Y & L. 233, 237 (describing the prevalence and practice of child marriage internationally and in Africa).

50. According to one women's rights organization in Southern Africa, "From the outset such relationships involve significant power imbalances from which it is extremely difficult and rare for a girl to carve out her own autonomy. This places the woman in a position of subservience with rights no less than those of labourers." MVUDUDU ET AL., *supra* note 40, at 21.

51. See, e.g., Naana Otoo-Oyortey & Sonita Pobi, *Early Marriage and Poverty: Exploring Links and Key Policy Issues*, in GENDER, DEVELOPMENT, AND MARRIAGE 42, 47 (Caroline Sweetman ed., 2003) ("The unequal power relations that exist between a young bride and her relatively older

Where early marriage occurs, it often causes serious health consequences for girls who become pregnant at a young age.⁵² Girls between the ages of ten and fourteen are five to seven times as likely to die from childbirth as their counterparts who are over twenty years of age.⁵³ One of the primary health risks for girls who marry and become pregnant at an early age is obstructed labor due to small pelvic bones. Obstructed labor can result in sepsis, hemorrhage, obstetric fistula, and death.⁵⁴

Many Commonwealth African countries have enacted legislation to regulate the age at which individuals may enter into marriage.⁵⁵ A number of countries require both boys and girls to be eighteen or older to marry.⁵⁶ Other countries have different marriage age requirements for boys and girls. In Tanzania, for example, the Law of Marriage Act, which applies to statutory, customary, and religious marriages, allows boys to marry at age eighteen and girls to marry at age fifteen.⁵⁷ In Uganda, marriage age

and more experienced husband mean that men often have total control over how, when, and where sexual intercourse takes place.”).

52. See Eno-Obong Akpan, *Early Marriage in Eastern Nigeria and the Health Consequences of Vesico-Vaginal Fistulae (VVF) Among Young Mothers*, in GENDER, DEVELOPMENT, AND MARRIAGE, *supra* note 51, at 70, 73 (“The large majority of VVF sufferers are young (usually between 12 and 20 years of age), poor, uneducated, rural women whose access to medical facilities is limited. . . . Typically, the sufferer experiences the damage during prolonged labour, often caused by a lack of physical maturity on the part of the mother.”); Sharon LaFraniere, *Nightmare for African Women: Birthing Injury and Little Help*, N.Y. TIMES, Sept. 28, 2005, at A1.

53. Nawal M. Nour, *Health Consequences of Child Marriage in Africa*, 12 EMERGING INFECTIOUS DISEASES 1644, 1646 (2006).

54. *Id.*

55. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, *Sixth Periodic Report of States Parties: Nigeria*, art. 101, CEDAW/C/NGA/6 (Oct. 5, 2006) (discussing Nigeria’s Child’s Rights Act which “stipulates eighteen years as the minimum age for marriage and betrothal”); U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Second and Third Periodic Reports of States Parties: Namibia*, art. 68, CEDAW/C/NAM/2-3 (Sept. 2, 2005) (“The Married Persons Equality Act makes eighteen (18) years the age of consent for entry into civil marriage for both sexes. . . .”); BENEDITA DA SILVA ET AL., BEYOND INEQUALITIES 2005: WOMEN IN MOZAMBIQUE 44 (2006) (discussing the new Family Law, which increases the minimum age of marriage from fifteen for girls and sixteen for boys to eighteen years for both boys and girls); Esther Damalie Naggita, *Why Men Come Out Ahead: The Legal Regime and the Protection and Realization of Women’s Rights in Uganda*, 6 E. AFR. J. PEACE & HUM. RTS. 34, 43 (2000); Manisuli Ssenyonjo, *Women’s Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda’s Constitutional Court*, 21 INT’L J.L. POL’Y & FAM. 341, 357 (2007).

56. See U.N. Comm. on the Elimination of Discrimination Against Women, *Sixth Periodic Report of States Parties: Nigeria*, 101, CEDAW/C/NGA/6 (Oct. 5, 2006); U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Second and Third Periodic Reports of States Parties: Namibia*, art. 68, CEDAW/C/NAM/2-3 (Sept. 2, 2005); U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Periodic Report of States Parties: Zimbabwe*, art. 60, CEDAW/C/ZWE/1 (July 20, 1996) (“Women over the age of 18 years can now enter into marriage without the consent of their fathers or guardians and men and women have the same right to enter into marriage.”).

57. See U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: United Republic of Tanzania*, art. 146, CEDAW/C/TZA/CO/6 (July 16, 2008) (“While noting that the proposed amendments to the Marriage Act purports [sic] to establish the legal minimum age for both girls and boys at 18 years instead of 15 years for girls and 18 years for boys as it stands under

requirements differ under statutory, customary, and religious law.⁵⁸ In addition to consent of the spouses, some countries require parental consent, depending on the age of the spouses.⁵⁹ In Ghana, for example, the Children's Act of 1998 established eighteen as the minimum age for marriage, but it allows children between sixteen and eighteen years old to wed with their parents' consent.⁶⁰

2. Bridewealth or *Lobola*

Bridewealth, sometimes called bride price or *lobola*, is the payment from a husband's family to a wife's family in recognition of the couple's marriage.⁶¹ Practiced primarily by patrilineal communities, *lobola* typically consists of two stages: small, introductory payments that initiate the marriage process and the "main ceremony where major payments are made."⁶²

Although the particular requirements for *lobola* and the name given to the practice differ among ethnic groups, there are some similarities across communities. For example, in many communities, *lobola* represents "the transfer of a woman's reproductive capacity from her natal family to the man's family."⁶³ Indeed, so strong is this connection between *lobola* and reproduction that "where the *lobola* has been paid and there are no children born of that marriage, traditionally the family of the woman is obliged to find a replacement for the bride or refund the *lobola*."⁶⁴

Over time, the meaning of the custom has changed. It has "lost much of its traditional and spiritual significance and has become highly

section 13 of the Marriage Act, the Committee is concerned at the delay in passing such amendment.").

58. Although the civil statute governing marriage stipulates that the parties to the marriage must be twenty-one years old, the Hindu marriage statute and the Customary Decree, which regulates customary marriage, require girls to be aged sixteen or over and boys to be eighteen or over. FAREDA BANDA, *WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE* 101 (2005). For marriages under Islamic law, there is no minimum age for marriage and girls as young as nine years old have been married. *Id.* The Domestic Relations Bill, which has languished in the Ugandan Parliament on and off for the last thirty-plus years, would establish eighteen as the minimum age for marriage for both men and women. Mary Karugaba, *Urgently Pass Domestic Relations Bill – Dr. Ntiro*, NEW VISION, Jan. 25, 2009, <http://www.newvision.co.ug/D/9/31/669293>.

59. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, *Third and Fourth Periodic Reports of States Parties: Zambia*, art. 64, CEDAW/C/ZAM/3-4 (Aug. 12, 1999); U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Report of States Parties: Zimbabwe*, art. 60, CEDAW/C/ZWE/1 (July 20, 1996); Calaguas et al., *supra* note 42, at 496; Sope Williams, *Nigeria, Its Women and International Law: Beyond Rhetoric*, 4 HUM. RTS. L. REV. 229, 239 (2004).

60. Sam, *supra* note 46, at 206.

61. MVUDUDU ET AL., *supra* note 40, at 13 (defining *lobola* as "the process where the family of the man makes payments to the family of the woman in the process of marriage.").

62. *Id.*

63. *Id.* at 15.

64. *Id.* at 16.

commercialized”⁶⁵ *Lobola* “is now seen as the purchase of a wife.”⁶⁶ In Ghana, “families of prospective brides demand huge sums of money in addition to other gifts.”⁶⁷

Under customary law, *lobola* is often a requirement for a valid customary marriage.⁶⁸ In some countries, such as Swaziland, the practice, while important, is not necessary for a valid customary marriage.⁶⁹ Within some ethnic groups in Nigeria and Zambia, on the other hand, *lobola* is a prerequisite for a valid customary marriage.⁷⁰ Similarly, Islamic law requires a payment from the husband’s family. For example, in Mozambique, *mahari* (contract money) must be paid to the bride before the ceremony may occur.⁷¹

Statutory law does not require the payment of *lobola* as a prerequisite to a valid civil marriage.⁷² However, although not legally required, statutory law in Tanzania provides for the option of paying bride price.⁷³ And even if couples choose to marry under statutory law, they sometimes incorporate traditional customs such as *lobola*.⁷⁴ The persistence of *lobola* payment, in

65. *Id.* at 26.

66. Sam, *supra* note 46, at 212.

67. *Id.*

68. See U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Reports of States Parties: Namibia*, art. 16.1, CEDAW/C/NAM//1 (Feb. 10, 1997); MVUDUDU ET AL., *supra* note 40, at 9; GEORGE O. NDEGE, CULTURE AND CUSTOMS OF MOZAMBIQUE 80 (2007); Pamela O. Davies, *Marriage, Divorce, and Inheritance Laws in Sierra Leone and their Discriminatory Effects on Women*, HUM. RTS. BRIEF, Fall 2005, at 17, 19; Tracy E. Higgins et al., *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT’L L.J. 1653, 1673 (2007).

69. See MVUDUDU ET AL., *supra* note 40, at 20; TICHAGWA, *supra* note 44, at 45.

70. See U.N. Comm. on the Elimination of Discrimination Against Women, *Third and Fourth Periodic Reports of States Parties: Zambia*, art. 65, CEDAW/C/ZAM/3-4 (Aug. 12, 1999) (“Payment of *lobola* is not a legal requirement. However, for marriages under customary law in patrilineal groups, it is one of the essential elements for establishing the existence of a marriage.”); Rahmatian, *supra* note 43, at 285.

71. See NDEGE, *supra* note 68, at 101-02; Naggita, *supra* note 55, at 45 (explaining that the Mohammedan Marriage and Divorce Act provides for customary practices, including payment of *mahari*).

72. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Initial and Second Periodic Reports of States Parties: Mozambique*, art. 65, CEDAW/C/MOZ/1-2 (Nov. 14, 2005); U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Report of States Parties: Zimbabwe*, art. 60, CEDAW/C/ZWE/1 (July 20, 1996); SIAME ET AL., *supra* note 35, at 41 (“Ordinance marriage . . . is validated not by the consent of a woman’s parents and by marriage payments but by compulsory registration and other civil procedures as stipulated by the Marriage Act.”).

73. See U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Comments for the Combined Fourth, Fifth and Sixth Periodic Report: United Republic of Tanzania*, art. 146, A/63/38 (July 11, 2008).

74. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, *Third and Fourth Periodic Reports of States Parties: Zambia*, 65, CEDAW/C/ZAM/3-4 (Aug. 12, 1999) (noting that “couples married under statutory law still comply with customary marriage requirements.”); U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Reports of States Parties: Namibia*, art. 16.1, CEDAW/C/NAM//1 (Feb. 10, 1997) (“[C]ivil marriages often incorporate customs usually associated with traditional marriage, such as bride price, thus producing an intertwining of the two systems.”); SIAME ET AL., *supra* note 35, at 42 (“Payment of *lobola* is normal in ordinance marriages.”).

both customary and statutory marriages, frustrates some women's rights activists.⁷⁵ A number of African feminists and others lament the customary practice, noting that it contributes to women's subordination within the family.⁷⁶ Some feminists have argued that "*lobola* demeans the status of women, making them servants, rather than partners, in marriage."⁷⁷ But despite calls for the practice's statutory prohibition, *lobola* continues to play a significant role in Commonwealth African marriages.

3. Monogamy/Polygamy

Customary law in most Commonwealth African countries allows polygamy.⁷⁸ Although polygamy is widespread within many of these countries, some countries attempt to regulate the practice by requiring legal registration of customary marriages or by requiring the husband to gain approval from an existing wife or from the court for subsequent marriages.⁷⁹ For example, in Tanzania, the Law of Marriage Act allows a first wife to contest a subsequent marriage.⁸⁰ South Africa requires a party to apply to the court for approval of polygamous marriage to ease the later distribution of property.⁸¹ As with customary law, Islamic law permits polygamous marriages.⁸² Several countries legally recognize polygamous

75. See, e.g., TANIA FLOOD ET AL., BEYOND INEQUALITIES: WOMEN IN SOUTH AFRICA 31 (1997) (referring to the argument "that *lobola* demeans the status of women, making them servants rather than partners in marriage"); Catherine Harries, *Daughters of Our Peoples: International Feminism Meets Ugandan Law and Custom*, 25 COLUM. HUM. RTS. L. REV. 493, 517 (1994) (remarking that "[t]here is currently a movement growing in Uganda, pushed by both male and female urban Elites, to abolish bride price.").

76. See, e.g., Margaret C. Oguli Oumo, *Property in Marriage Relations: Its Legal Implications for Women in Uganda*, in VOICES OF AFRICAN WOMEN, *supra* note 4, at 243; Sam, *supra* note 46, at 212.

77. FLOOD ET AL., *supra* note 75, at 31.

78. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Fourth and Fifth Periodic Reports of States Parties: Nigeria*, art. 16.3, CEDAW/C/NGA/4-5 (Apr. 28, 2003); U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Report of States Parties: South Africa*, art. 106, CEDAW/C/ZAF/1 (Feb. 25, 1998); ZAKHEHLANZE & LOLO MKHABELA, BEYOND INEQUALITIES: WOMEN IN SWAZILAND, 34 (1998); IIPINGE & LEBEAU, *supra* note 13, at 32; Davies, *supra* note 68, at 18 ("Under customary law, a man can marry as many wives as he desires and can afford.").

79. See *infra* notes 80-81.

80. See Calaguas et al., *supra* note 42, at 497 ("With regard to polygamous unions, the [Law of Marriage Act] gives the current wife (or wives) the right to object to additional spouses under certain circumstances: if the husband is of limited means and the marriage would likely cause hardship to the family, or if the would-be wife is 'of notoriously bad character,' is inflicted with a communicable disease, or is 'likely to introduce grave discord into the household.'" (citations omitted)).

81. See Higgins et al., *supra* note 68, at 1684 (referring to Section 7(6) of South Africa's 1998 Recognition of Customary Marriages Act).

82. See U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Fourth and Fifth Periodic Reports of States Parties: Nigeria*, art. 16.3, CEDAW/C/NGA/4-5 (Apr. 28, 2003); NDEGE, *supra* note 68, at 79 ("[P]olygyny was accepted and widely practiced among Moslems and so was the norm . . . across the predominantly Moslem Mozambican society."); Ssenyonjo, *supra* note 55, at 349 ("Apart from customary marriages, Ugandan law recognizes Islamic polygynous marriages. These are governed by the Marriage and Divorce of

marriages within religious marriage law.⁸³ Islamic law limits a man to no more than four wives.⁸⁴

In the majority of Commonwealth African countries, statutory marriage law prohibits polygamy.⁸⁵ Despite statutory requirements for monogamy in civil marriages, some men contract a civil marriage and subsequently marry additional wives under customary law.⁸⁶ Ugandan scholar Margaret Oguli Oumo observes, "Polygamy is a feature in the African family system and is considered a symbol of wealth. . . . Polygamy lowers the status of a wife relative to her husband. . . . The husband becomes the master and his wives compete for his favors."⁸⁷

Although most civil marriage statutes prohibit polygamy, it nevertheless still occurs. In many Commonwealth African countries, polygamy is common in customary and Islamic marriages. In some instances, when African feminists have advocated for the abolition of polygamy, they have encountered vociferous resistance from those who believe the practice is an important marker of cultural identity.⁸⁸

4. Regulation of Sexuality

Custom and tradition operate as a mechanism of control over women's sexuality in the context of marriage.⁸⁹ Families and communities police the boundaries of marriage through several forms of social control targeted at women and girls. The methods of controlling women's sexuality and reproductive autonomy include, *inter alia*, female genital mutilation (FGM), virginity testing, and "curative" or "corrective" rape.

Mohammedans Act.").

83. See U.N. Comm. on the Elimination of Discrimination Against Women, *Second and Third Periodic Reports of States Parties: Nigeria*, 63, CEDAW/C/NGA/2-3 (Feb. 26, 1997) ("Pure polygamy, that is marriage of two or more wives under Customary or Islamic Law is legal and recognized."); Ssenyonjo, *supra* note 55, at 349 ("Apart from customary marriages, Ugandan law recognizes Islamic polygynous marriages.").

84. See Davies, *supra* note 68, at 18; Rahmatian, *supra* note 43, at 286 (noting that "[a] man has the right to marry up to four women if he is able to treat them with perfect equality").

85. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Mozambique*, art. 22, CEDAW/C/MOZCO/2 (June 11, 2007); U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Fourth and Fifth Periodic Reports of States Parties: Nigeria*, art. 16.1, CEDAW/C/NGA/4-5 (Apr. 28, 2003); LIPINGE & LEBEAU, *supra* note 13, at 32; Williams, *supra* note 59, at 240-41.

86. Oguli Oumo, *supra* note 76, at 243, 247.

87. *Id.* at 247-48.

88. See Bond, *Gender, Discourse*, *supra* note 12, at 541 (describing the controversy surrounding polygamy in the drafting of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa).

89. Adjetey, *supra* note 34, at 1356 (arguing that "[m]ale dominated societies employ customary law to hold women captive to their reproductive functions.").

a) FGM

Female genital mutilation (FGM) refers to the process of “intentionally alter[ing] or injur[ing] female genital organs for non-medical reasons.”⁹⁰ The World Health Organization divides FGM into four categories: clitoridectomy (Type I), excision (Type II), infibulation (Type III), and other procedures involving genital cutting for non-medical reasons (Type IV).⁹¹ Infibulation, which involves “the removal of the clitoris, labia minora, and parts of the labia majora,” is the most severe form of FGM.⁹² The WHO estimates that 92 million African girls aged ten and above have undergone FGM.⁹³ Prevalence rates of FGM vary significantly by country: 78.3% in Gambia, 3.8% in Ghana, 27.1% in Kenya, 58.2% in Liberia, 85.2% in Mali, 29.6% in Nigeria, 14.6% in Tanzania, and 0.8% in Uganda.⁹⁴ The health consequences of FGM can be severe or fatal and may include: “acute pain, post-operative shock, urine retention, bladder infection, . . . hemorrhaging, tetanus, septicemia,”⁹⁵ and transmission of the HIV virus through unsanitary surgical tools.⁹⁶

Communities that practice FGM do so for a variety of reasons. FGM stems from gender inequality and “represents society’s control over women.”⁹⁷ Some view FGM as a way to restrict women’s sexuality by eliminating or “reducing their sexual fulfillment.”⁹⁸ These families believe

90. WORLD HEALTH ORG., *Female Genital Mutilation* (Feb. 2010), <http://www.who.int/mediacentre/factsheets/fs241/en/>.

91. CTR. FOR REPROD. RTS., *FEMALE GENITAL MUTILATION: A MATTER OF HUMAN RIGHTS* 8 (2d ed. 2006). The WHO defines the categories as follows:

Clitoridectomy: partial or total removal of the clitoris and . . . in very rare cases, only the prepuce . . .

Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora . . .

Infibulation: narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, or outer, labia with or without removal of the clitoris.

Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

WORLD HEALTH ORG., *supra* note 90.

92. Adjetej, *supra* note 34, at 1362.

93. *Female Genital Mutilation*, *supra* note 90.

94. These figures are from 2004 to 2009, depending on the country. WORLD HEALTH ORG., *Female Genital Mutilation and Other Harmful Practices*, <http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/index.html> (last visited Feb. 21, 2011).

95. Adjetej, *supra* note 34, at 1362.

96. See Patricia A. Broussard, *The Importance of Female Genital Mutilation to the West: The Cruellest Cut of All*, 44 U.S.F. L. REV. 787, 791 (2010); Kelleen O’Fallon, *Matter of A-T-: Opening the Door for Gender as a Particular Social Group in Asylum Applications*, 9 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 397, 400 (2009).

97. WORLD HEALTH ORG. ET AL., *ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT* 5 (2008), available at http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf [hereinafter INTERAGENCY STATEMENT].

98. CTR. FOR REPROD. RTS., *supra* note 91, at 8.

that this increases the chance that a young woman will remain a virgin before marriage.⁹⁹ Virginity at marriage is an entrenched social value.¹⁰⁰ Many communities, in fact, treat women's virginity as a prerequisite for marriage.¹⁰¹ Families have a financial incentive to ensure a daughter's virginity at marriage, as virginity may affect the family's negotiations over the amount of bridewealth it will receive at the time of her marriage.¹⁰²

There are also several historical-institutional reasons for the practice. Women who have undergone FGM and view it as an important marker of their own identity often support the practice.¹⁰³ The mostly female practitioners who charge fees for performing FGM also have an economic incentive to continue the practice.¹⁰⁴ In communities where FGM is common, there tends to be strong social pressure for families to choose FGM for their daughters.¹⁰⁵ Although religious texts do not encourage the practice, some religious leaders support FGM as a religious act.¹⁰⁶ Other religious leaders openly oppose the practice.¹⁰⁷

Some countries have enacted laws prohibiting FGM, but many of these have been criticized as ineffective.¹⁰⁸ It is widely recognized among non-governmental organizations that criminal prohibitions alone will accomplish little.¹⁰⁹ Legal sanctions must be accompanied by widespread public education campaigns and broader policy initiatives designed to enhance women's autonomy in matters related to sexual and reproductive health.¹¹⁰ One strategy that has enjoyed success in parts of Kenya, for

99. See, e.g., Zsaleh E. Harivandi, *Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum*, 95 CORNELL L. REV. 599, 611 (2010).

100. See generally Erika R. George, *Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities*, 96 CAL. L. REV. 1447 (2008).

101. Patricia A. Armstrong, *Female Genital Mutilation: The Move Toward the Recognition of Violence Against Women as a Basis for Asylum in the United States*, 21 MD. J. INT'L L. & TRADE 95, 97-98 (1997) ("Because several African tribes prescribe virginity as a prerequisite for marriage, supporters believe FGM protects a woman from her own desire to have promiscuous sexual intercourse.").

102. George, *supra* note 100, at 1454 (describing how "[a] potential bride's virginity was a factor in the negotiations between a bride's parents and her future in-laws to determine what amount of wealth was to be transferred from the groom's family to the bride's family . . .").

103. WORLD HEALTH ORG., *supra* note 97, at 7.

104. See, e.g., EFUA DORKENOO, CUTTING THE ROSE: FEMALE GENITAL MUTILATION 50 (1994) ("Part of the reason for the continuation of the practice of FGM lies in the fact that it is an irreplaceable source of revenue for excisors.").

105. See WORLD HEALTH ORG., *supra* note 97, at 5. ("Where female genital mutilation is widely practiced, it is supported by both men and women, usually without question, and anyone departing from the norm may face condemnation, harassment, and ostracism.").

106. See *id.* at 6.

107. See *id.*

108. *Annotated Legal Bibliography on Gender*, 14 CARDOZO J. L. & GENDER 819, 848 (2008) (noting that "[r]egional laws have also been ineffective because they do not have adequate procedures to monitor the violation of the crime and are rarely enforced.").

109. See, e.g., CTR. FOR REPROD. RTS., *supra* note 91, at 28-29.

110. For a discussion of how legal sanctions might interact with other methodologies, see, for example, Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 682 (1992).

example, is the promotion of alternative rites of passage for girls.¹¹¹

b) VirginitY Testing and "Curative Rape"

Another way of restricting sexual behavior prior to marriage is through virginitY testing, which has enjoyed a resurgence in South Africa. "VirginitY testing, a prenuptial custom traditionally conducted just prior to marriage, refers to the examination of females to ascertain whether or not they are sexually chaste."¹¹² In South Africa, some have embraced virginitY testing not only as a way to police morality among young women but also as a tool to combat the spread of HIV/AIDS.¹¹³ Misconceptions about virginitY further complicate the issue. For example, "[s]ome South African researchers attribute the increase in sexual violence against young girls who are presumed to be virgins to a belief, gaining credence in some communities, that sexual intercourse with a virgin can 'cleanse' men with HIV or AIDS of the disease."¹¹⁴ Communities often label those who fail the tests as "unmarriageable."¹¹⁵ The emotional and physical risks for girls who fail the tests are significant, with many exposed to shame and ostracism within the community and abuse within their families.¹¹⁶ On the other hand, some South African feminists oppose the practice as a violation of young women's privacy and equality rights.¹¹⁷

Human rights organizations in South Africa also report that lesbians in that country are targeted for so-called "curative" or "corrective" rape.¹¹⁸ An Action Aid report documents instances of such rape, noting that "only one in five reported rapes ends up in court, with just over 4% of these cases resulting in a conviction."¹¹⁹ "Curative" rape represents a violent and extreme example of enforced heteronormativity. The rape is designed to "cure" homosexuality and make the victim "marriageable." Each of these strategies for regulating sexuality harms women and does so largely in the name of marriage.

111. CTR. FOR REPROD. RTS., *supra* note 91, at 40.

112. George, *supra* note 100, at 1449.

113. *Id.* at 1447-48.

114. *Id.* at 1461.

115. *Id.* at 1462.

116. *Id.*

117. *Id.* at 1449-50 (describing the "politically charged" nature of the debate over virginitY testing in South Africa as a clash between "human rights universalism and cultural relativism").

118. For more information on what is referred to as "curative" or "corrective" rape, see HUMAN RIGHTS WATCH & THE INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA 193 (2003), available at <http://www.hrw.org/sites/default/files/reports/safriglhr0303.pdf> [hereinafter HUMAN RIGHTS WATCH].

119. ACTION AID, HATE CRIMES: THE RISE OF "CORRECTIVE" RAPE IN SOUTH AFRICA 13 (2009), available at http://www.actionaid.org.ul/101756/hate_crimes_the_rise_of_corrective_rape_in_south_africa.html.

B. Rights Within Marriage

1. Property

Land is the most important form of property in many parts of Commonwealth Africa.¹²⁰ Because many African communities are agrarian, a lack of access to property “makes women economically dependent and thwarts their efforts at achieving economic independence.”¹²¹ In Botswana, many unmarried women still rely on their fathers or brothers for access to land or cattle.¹²² Even when married women contribute to the purchase of land, they “rarely hold matrimonial land as joint owners with their spouses.”¹²³ Customary law in Kenya permits women to farm land but not to own it or make decisions as to its maintenance or disposal.¹²⁴ Customary law in Malawi allows women’s ownership of so-called “feminine” property, such as cooking utensils, but not “masculine” property, such as land or vehicles.¹²⁵ Similarly, customary law in Zimbabwe restricts women’s ownership to moveable property, such as cash or livestock.¹²⁶ Despite this limited property right, “most moveable property acquired during the course of a customary marriage belongs to the husband.”¹²⁷

In some countries, statutory law has provided improved access to property within marriage. For example, in 1996 Botswana amended its Deeds Registry Act, allowing women to execute deeds and other documents without their husbands’ consent.¹²⁸ Tanzania’s Law of Marriage

120. See Florence Butegwa, *Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-Level Action*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 108, 110 (Abdullahi A. An-Na’im ed., 2002) (“[W]omen increasingly realize that lack of access to land is the major determinant of poverty and social status both in rural and urban areas.”).

121. Akua Kuenyehia, *Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa*, 40 U.C. DAVIS L. REV. 385, 387 (2006); see also Aparna Polavarapu, *Procuring Meaningful Land Rights for the Women of Rwanda*, 14 YALE HUM. RTS. & DEV. L.J. 105 (2011) (identifying the legal, structural, and historical obstacles to equal rights in land ownership).

122. ELSIE M. ALEXANDER ET AL., BEYOND INEQUALITIES 2005: WOMEN IN BOTSWANA 38 (2005) (“[I]t is still difficult for single women to access land due to the customary rules and practices that some Land Board officials still implement.”).

123. Bosire Maragia, *Gender Struggles in Homosocial Settings: Reconstructing Gender and Social Equity for Sustainability in Post-Colonial Societies*, 16 AM. U. J. GENDER SOC. POL’Y & L. 335, 349 (2008).

124. Elin Henrysson & Sandra F. Joireman, *On the Edge of the Law: Women’s Property Rights and Dispute Resolution in Kisii, Kenya*, 43 LAW & SOC’Y REV. 39, 43 (2009).

125. See United Nations Committee on the Elimination of Discrimination Against Women [CEDAW], *Combined Second, Third, Fourth, and Fifth Periodic Report of States Parties: Malawi*, 81, CEDAW/C/MWI/2-5 (June 28, 2004) (“For all the marriages however, property rights are feminised or masculinised. Cooking utensils, for example, are for women while the other property such as land and cars are usually for men.”).

126. CTR. FOR REPROD. LAW AND POLICY, WOMEN OF THE WORLD: ANGLOPHONE AFRICA 142 (1999) [hereinafter ANGLOPHONE AFRICA].

127. *Id.*

128. See U.N. Comm. on the Elimination of Discrimination Against Women, *Combined*

Act provides some protection for women's property interests in the marital home by prohibiting alienation by one spouse during the existence of the marriage.¹²⁹ Similarly, Namibia's Married Persons Equality Act, which applies only to marriages contracted under civil law, requires couples to register immovable property in both spouses' names.¹³⁰ The Married Women's Property Act in Ghana ensures the right of women married under the civil Marriage Ordinance to own property in their own names.¹³¹

Even when statutory law permits women's ownership of land or other property, however, some obstacles remain. For example, when Kenya passed its Registered Lands Act, which permits women to register title to land, "men rushed to register land, and the passage of the statute did not permit subsequent alteration of the register, thereby precluding women from changing the register to accommodate their interests."¹³² Despite some statutory interventions in favor of women's marital property rights, traditional patriarchal attitudes toward women's role within the family make it difficult for women to fully enjoy those rights.

2. Non-violence

As in most of the world, in Commonwealth Africa violence against women in the family occurs with startling regularity. "Any inquiry into the place of violence in African life runs the risk of reproducing a stereotypical image of a homogenous and 'uncivilized' part of the world that has helped to justify Western racism, colonialism, and paternalism."¹³³ Nevertheless, violence against women occurs in Africa, as in other parts of the world, and must be examined. Although communities differ widely in their attitudes toward violence against women, detailed case studies and specific comparisons across borders are simply beyond the scope of this Article.

Partly a result of the normalization of violence within the family,¹³⁴ the vast majority of familial gender-based violence goes unreported.¹³⁵ Statistics indicate that physical abuse, including marital rape, is common in African marriages.¹³⁶ In Ghana, one third of women surveyed reported

Initial, Second, and Third Periodic Reports of States Parties: Botswana, art. 51, CEDAW/C/BOT/3 (Oct. 20, 2008).

129. ANGLOPHONE AFRICA, *supra* note 126, at 123.

130. IIPINGE & LEBEAU, *supra* note 13, at 10.

131. Fenrich & Higgins, *supra* note 5, at 283.

132. ANGLOPHONE AFRICA, *supra* note 126, at 67.

133. Scott London, *Domestic Violence: Sub-Saharan Africa*, in 2 ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURES, *supra* note 10, at 126.

134. The Malawian saying "*chikwati ndikupilira*," or "marriage demands perseverance," conveys the notion that a couple should remain together regardless of the existence of abuse. Rose Chisowa, *Why Women and the Girl Child?*, in GENDER BASED VIOLENCE: TWENTY THREE STORIES 30, 32 (Kamanga Zulu ed., 2008).

135. See, e.g., Alfred Banda, *The Silence of a Battered Wife*, in GENDER BASED VIOLENCE, *supra* note 134, at 25, 29 ("[O]nly 4% of the total victims reported their cases to police because they do not view abuse as illegal and find it not serious enough to warrant police intervention").

136. See, e.g., Mumbi Machera, *Domestic Violence in Kenya: A Survey of Newspaper Reports*, in

being hit, slapped, or otherwise physically abused by a current or recent partner.¹³⁷ According to another study, over 49% of women in Malawi have been victims of domestic violence.¹³⁸ Almost 60% of women surveyed reported sexual abuse by a partner at some point in their lives.¹³⁹ Of that group, only 4% reported the abuse to the police.¹⁴⁰

Commentators differ on the causes of domestic violence in Commonwealth Africa.¹⁴¹ There is, however, an emerging consensus that unequal power relations between men and women are a core factor in gender-based violence in the home.¹⁴² Many men attempt to justify marital violence by suggesting that their wives have not lived up to their marital obligations. Some suggest, for example, that a woman's behavior in the home may lead to abuse if she is not "cautious and calm"¹⁴³ (behavior traditionally expected from a wife), or if she does not fulfill her customary marital duties such as "cooking, cleaning, and washing."¹⁴⁴ These "justifications" for violence reflect rigid gender-based roles within the family.

Although it is common for the general penal code to criminalize assault, few African Commonwealth countries have enacted specific domestic violence legislation.¹⁴⁵ Marital rape is not considered a crime in many Commonwealth African countries.¹⁴⁶ In Malawi, for example,

MEN, WOMEN AND VIOLENCE 1997, 27, 47 (Felicia Oyekanmi ed., 1997); Chi Mgbako et al., *We Will Still Live: Confronting Stigma and Discrimination Against Women Living with HIV/AIDS in Malawi*, 31 FORDHAM INT'L L.J. 528, 545 (2008) (referring to a study that "indicated that three-quarters of all the women surveyed had been forced to have sex by their intimate partners at least once.").

137. Marilyn Aniwa, *Prevalence*, in BREAKING THE SILENCE & CHALLENGING THE MYTHS OF VIOLENCE AGAINST WOMEN AND CHILDREN IN GHANA 50, 65 (Dorcas Coker-Appiah & Kathy Cusack eds., 1999) [hereinafter BREAKING THE SILENCE].

138. Banda, *supra* note 135, at 29.

139. *Id.*

140. *Id.*

141. In Ghana, for example, one commentator suggests that alcohol, job status, educational status, stress, poverty, gender roles, relationships with in-laws and other members of the family, and conflict over children, *inter alia*, are all factors in marital conflict. Henrietta Abane, *Towards Research into Wife Battering in Ghana: Some Methodological Issues*, in MEN, WOMEN AND VIOLENCE, *supra* note 136, at 16, 20.

142. See, e.g., Valerie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 FORDHAM INT'L L.J. 487, 495 (2008).

143. Abane, *supra* note 141, at 16 ("In Ghana, wife beating is a man's way of teaching the wife a lesson, and even women have shown less sympathy for victims of wife beating who, according to custom, should learn to be cautious and calm.").

144. Kathy Cusack, *Defining Violence*, in BREAKING THE SILENCE, *supra* note 137, at 1, 15 ("Failure of a woman or child to fulfill socially defined roles or expectations were [sic] usually used to describe disobedience.").

145. Botswana, for example, lacks a law specifically prohibiting gender-based violence. WOMEN & LAW IN S. AFR. RESEARCH TRUST, NO SAFE PLACE: INCEST AND DEFILEMENT IN BOTSWANA 19 (2002). Similarly, the Gambia has no specific laws that deal with domestic violence; rather, physical violence within a marriage is covered by general assault laws. See U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Initial, Second, and Third Periodic Reports of States Parties: Gambia*, art. 44, CEDAW/C/GMB/1-3 (Apr. 10, 2003).

146. See, e.g., ALICE K. ARMSTRONG, CULTURE AND CHOICE: LESSONS FROM SURVIVORS OF

statutory law assumes consent to sex to be part of the marital contract.¹⁴⁷ As long as the “punishment” is not disproportionate to the “offense,” customary law in Ghana and Zimbabwe allows a husband to “chastise” his wife.¹⁴⁸

Victims of domestic violence and marital rape may have a number of reasons for not reporting the violence to police. First, access to the legal system and to social services can be quite limited. For example, 64% of women living in rural Malawi simply did not know where to go to report domestic violence.¹⁴⁹ Second, marital rape simply may not be criminalized.¹⁵⁰ Third, even if gender-based violence is prohibited, police and prosecutors may not take the issue seriously.¹⁵¹ Fourth, violence may be so widespread that victims themselves do not view the behavior as criminal. The belief that husbands have the right to physically punish their wives is widespread among Commonwealth African countries.¹⁵² A 2004 United Nations factsheet, for example, reported that 51% of women in Botswana believed that their husbands had the right to beat them.¹⁵³ For these and other reasons, legal prohibitions on domestic violence and marital rape are not always effective. Widespread public education and awareness-raising efforts are necessary in order to change public perception concerning violence against women in the home.¹⁵⁴

GENDER VIOLENCE IN ZIMBABWE 81 (1998) (“‘Culturally’ a wife is expected to have sex with her husband, and he is said to be entitled to decide when and how.”); BARBARA LOPI ET AL., BEYOND INEQUALITIES 2008: WOMEN IN SOUTHERN AFRICA 95 (2008); Cusack, *supra* note 137, at 29 (observing “unanimity between both women and men that there is no such thing as forced sex in marriage or that it does not constitute violence”).

147. MARION BAUMGART DOS SANTOS, CONSENSUS: COMBATING GENDER BASED VIOLENCE THROUGH ISLAM, TRADITION, AND LAW 62 (2006).

148. ARMSTRONG, *supra* note 146, at 55-56 (“[M]any people claim that moderate ‘chastisement’ of the wife by the husband is allowed Written records of Shona traditional law state that a woman may complain if her husband hits her unreasonably or excessively.”); Cusack, *supra* note 144, at 15 (“[I]t was acceptable to correct, discipline or chastise women and children so long as the chastisement was seen as being *proportionate* to the act of disobedience.”).

149. Chisowa, *supra* note 134, at 34.

150. See, e.g., BHAGIAWATTY GUNGANAH ET AL., BEYOND INEQUALITIES: WOMEN IN MAURITIUS 28 (1997) (commenting that in Mauritius, “[g]iven the state of the present provision of the law concerning marital obligation it is almost impossible to prosecute marital rape”).

151. ARMSTRONG, *supra* note 146, at 70 (“Although the police are in many instances helpful, in others they prefer to let the couple solve their problems at home and do not want to get involved.”); Mansah Prah, *Outcomes to Women’s and Children’s Responses*, in BREAKING THE SILENCE, *supra* note 137, at 110.

152. See, e.g., Morayo Atinmo, *Sociocultural Implications of Wife Beating Among the Yoruba in Ibadan City, Nigeria*, in MEN, WOMEN AND VIOLENCE, *supra* note 136, at 77, 82 (“[A] man does have the right to control his wife, to be the head of the family, the boss, without being queried. This is part of the cultural nexus in which men are seen as having a natural right to control and discipline their wives.”); Bélair, *supra* note 35, at 570 (“[U]nder customary law, the man has the right to beat his wife if she ‘misbehaves.’”).

153. LOPI ET AL., *supra* note 146, at 95.

154. See Kathy Cusack, *Conclusions*, in BREAKING THE SILENCE, *supra* note 137, at 172, 173 (“Such a campaign should include rights awareness work targeting primarily women and children and information about existing legislation and services, as well as how to access such services.”).

3. Reproductive Rights

The ability to make decisions about one's reproductive capacity and health is a fundamental right.¹⁵⁵ A woman's freedom to choose the number and spacing of her children may dramatically affect her health, economic status, education, and many other facets of life.¹⁵⁶ In parts of Commonwealth Africa, however, the prevailing legal regime actively limits women's control over sex and reproduction.¹⁵⁷

Colonialism brought restrictive abortion laws to Commonwealth Africa.¹⁵⁸ Before the colonial period, some African communities accepted the use of abortifacients.¹⁵⁹ The Maasai in Kenya, for example, allowed the abortion of unwanted pregnancies in certain situations, such as the pregnancy of a young, unmarried woman, or in cases of rape.¹⁶⁰ In the postcolonial period, access to abortion has remained limited throughout Commonwealth Africa.¹⁶¹ Lesotho, Malawi, Mauritius, Mozambique, Swaziland, and Tanzania have not modified their abortion laws since independence, restricting abortion to situations where it is necessary to save the life of the pregnant woman.¹⁶² Some countries recognize a limited right to abortion when pregnancy or childbirth threaten a woman's physical or mental health.¹⁶³ In Botswana, a woman may also end a pregnancy caused by rape within the first sixteen weeks.¹⁶⁴ The Ghanaian Criminal Code provides an exception to the general prohibition in cases of rape and incest, as well as where there is a risk of serious disease or deformity of the child.¹⁶⁵ Punishment for violating these laws is often strict.

155. See Cook, *supra* note 110, at 684 (arguing that "[w]omen's right to control their fertility . . . [may] be considered a fundamental key that opens up women's capacity to enjoy other human rights").

156. See, e.g., U.N. POPULATION FUND, *THE RIGHT TO CHOOSE: REPRODUCTIVE RIGHTS AND REPRODUCTIVE HEALTH* 10 (1997).

157. See Higgins et al., *supra* note 68, at 1677.

158. Charles Ngwenya, *An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective*, 32 J.L. MED. & ETHICS 708, 711 (2004).

159. *Id.* ("Use of abortifacients was largely regarded as a matter for the family rather than the indigenous court."). But see Nana Oye Lithur, *Destigmatising Abortion: Expanding Community Awareness of Abortion as a Reproductive Health Issue in Ghana*, 8 AFR. J. REPROD. HEALTH 70, 72 (2004) ("Traditionally, abortion is perceived as a shameful act. In the Ga tradition, families where women are known to have performed abortion are branded as 'the family where its womenfolk remove pregnancies.'").

160. Fred Sai, *International Commitments and Guidance on Unsafe Abortion*, 8 AFR. J. REPROD. HEALTH 15, 21 (2004).

161. See Ngwenya, *supra* note 158, at 716 ("[T]he majority of SADC countries have . . . held on to their colonial bequest of unduly restrictive and inaccessible abortion regimes at the cost of oppressing women, and jettisoning the goal of achieving gender equality.").

162. *Id.* at 712.

163. See *id.* at 711 (providing a comparison of abortion laws in SADC countries).

164. See U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Initial, Second, and Third Periodic Reports of States Parties: Botswana*, art. 240, CEDAW/C/BOT/3, (Oct. 20, 2008).

165. See JOHANNA O. SVANIKIER, *WOMEN'S RIGHTS AND THE LAW IN GHANA* 59 (1997) (discussing exceptions to the law restricting abortion).

In Kenya, helping a woman to obtain an abortion exposes the accused to up to fourteen years in prison, and a woman who has had an illegal abortion faces up to seven years' imprisonment.¹⁶⁶ In Ghana, both parties could be sentenced to up to five years in prison.¹⁶⁷

Access to safe abortion depends greatly upon a woman's socioeconomic position. Safe abortion procedures are largely available only to wealthier, educated women.¹⁶⁸ Unsafe abortion often leads to severe medical problems or even death.¹⁶⁹ Approximately 40% of women around the world who die from unsafe abortions are African (about 34,000 each year).¹⁷⁰ In 1991, 40% of admissions to Cameroonian OB/GYN emergency wards were related to illegal abortions.¹⁷¹ In a study of two major hospitals in Ghana, it was found that unsafe abortion caused between 22% and 30% of maternal deaths.¹⁷² Another study estimated that unsafe abortion caused one third of maternal deaths in Kenya.¹⁷³ Throughout Africa, there is an inverse correlation between abortion rights and infant and maternal mortality.¹⁷⁴ Although not as restrictive as abortion laws, lack of access to contraceptives in Commonwealth Africa also interferes with women's enjoyment of their reproductive rights.¹⁷⁵ Breastfeeding and postpartum abstinence remain the most important methods of reproductive regulation.¹⁷⁶

Although women bear the brunt of pregnancy and childbirth, the decision to conceive and space their children is often made by their husbands.¹⁷⁷ Some women fear violence, rejection, or accusations of extramarital affairs from their partners if they suggest condom use.¹⁷⁸ Doctors in Cameroon must have the husband's written permission before undertaking a permanent sterilization procedure on women.¹⁷⁹ In some

166. ANGLOPHONE AFRICA, *supra* note 126, at 63.

167. *Id.* at 40.

168. See Sai, *supra* note 160, at 16.

169. See Lithur, *supra* note 159, at 72.

170. See Ngweni, *supra* note 158, at 709.

171. CTR. FOR REPROD. LAW & POLICY, WOMEN OF THE WORLD: FRANCOPHONE AFRICA 76 (1999).

172. Lithur, *supra* note 159, at 72.

173. ANGLOPHONE AFRICA, *supra* note 126, at 54.

174. See Chad M. Gerson, *Toward an International Standard of Abortion Rights: Empirical Data from Africa*, 18 PACE INT'L L. REV. 373, 380 (2006).

175. See Ebenezer Durojaye & Victoria Balogun, *Human Rights Implications of Mandatory Premarital HIV Testing in Nigeria*, 24 INT'L J. L. POL'Y & FAM. 245, 247 (2010).

176. See Sarah C. Richards, "Spoiling the Womb": Definitions, Aetiologies and Responses to Infertility in North West Province, Cameroon, 6 AFR. J. REPROD. HEALTH 84, 87 (2002).

177. Adjete, *supra* note 34, at 1359 ("[A]fter the payment of the bride price all decisions in relation to a woman's reproductive life are determined by her husband, who has paid for this right. This in turn impacts on her ability to make decisions on how many children she will bear and the amount of spacing between each birth.").

178. See LISA VETTEN & KAILASH BHANA, VIOLENCE, VENGEANCE, AND GENDER 10 (2001) (discussing reasons that South African women do not use contraception despite the AIDS pandemic).

179. See U.N. Comm. on the Elimination of Discrimination Against Women, *Initial Reports of States Parties: Cameroon*, CEDAW/C/CMR/1, 95 (May 9, 1999).

communities, the practice of lobola limits a wife's ability to make decisions regarding contraception, as her husband may believe that he bought the right to control her reproductive life.¹⁸⁰

When a woman does conceive, she faces the threat of maternal mortality. The risk of a woman in Sub-Saharan Africa dying in pregnancy over the course of her life is roughly 1 in 13.¹⁸¹ By contrast, women in industrialized countries face a 1 in 4,100 chance of dying in childbirth.¹⁸² Pregnancy is a significant risk for a woman and one that she may not undertake voluntarily.

Women's ability to exercise their reproductive rights is slowly improving throughout Africa. Fertility rates are dropping,¹⁸³ and certain governments have issued official policies to support family planning.¹⁸⁴ Nevertheless, women's access to contraception and safe abortions remains limited. Women's inability to regulate the number and spacing of their children sometimes exposes them to devastating economic, cultural, and medical consequences.

C. Rights at Dissolution of Marriage

1. Property

Statutory law generally regulates the dissolution of civil marriages. Ethiopia, Ghana, and South Africa, among other countries, have extended the reach of formal, civil courts in matters related to dissolution of marriage.¹⁸⁵ Some Commonwealth countries have retained a fault-based divorce system. Civil divorce in Namibia, for example, is permissible upon a showing of adultery, malicious desertion, and under certain circumstances imprisonment and insanity, with a larger share of marital property going to the "innocent" party.¹⁸⁶ Other countries allow no-fault divorce within civil marriages on the grounds of "irretrievable breakdown" of the marriage.¹⁸⁷

Customary law generally provides little property for divorcing women.¹⁸⁸ Customary divorces are often negotiated by the families of the

180. See Adjetej, *supra* note 34, at 1359.

181. UNICEF, PROGRESS SINCE THE WORLD SUMMIT FOR CHILDREN: A STATISTICAL REVIEW 14 (2001), available at http://www.unicef.org/publications/files/pub_wethechildren_stats_en.pdf.

182. *Id.*

183. ANGLOPHONE AFRICA, *supra* note 124, at 30, 53 (demonstrating falling fertility rates in Ghana and Kenya).

184. *Id.* at 37 (describing initiatives of the Ghanaian government).

185. CTR. FOR REPROD. LAW & POLICY, WOMEN OF THE WORLD: ANGLOPHONE AFRICA: 2003 SUPPLEMENT 167 (2003).

186. IIPINGE & LEBEAU, *supra* note 13, at 32.

187. ANGLOPHONE AFRICA, *supra* note 126, at 141 ("Irretrievable breakdown is defined to be a state where 'there is no reasonable prospect of the restoration of a normal marriage relationship.'").

188. See, e.g., Sam, *supra* note 46, at 212-13 ("At dissolution of a traditional marriage before

spouses¹⁸⁹ and often require that the wife's family repay any bridewealth that was paid at the time of the marriage.¹⁹⁰ Divorce under customary law rarely provides the divorcing wife any property beyond a minimal amount of money or personal property.¹⁹¹ In Ghana, women divorcing under customary law may be entitled to "send off" money.¹⁹²

According to Zimbabwe's Matrimonial Causes Act, courts must equitably divide marital property in the event of dissolution of a registered customary marriage.¹⁹³ Because many Zimbabwean women have unregistered customary law marriages, however, they are unable to receive relief under the Matrimonial Causes Act.¹⁹⁴ In Ghana, the Matrimonial Causes Act governs divorces in civil law marriages and, in very limited circumstances, some customary marriages.¹⁹⁵ As I have noted elsewhere, in Ghana, "[d]espite additional constitutional guarantees requiring that assets jointly acquired during the marriage be 'equitably' distributed upon divorce, women continue to be at the mercy of judges' discretion in a legal and social environment in which women's financial and nonmonetary contributions to the marriage are minimized or ignored."¹⁹⁶

2. Custody and Maintenance

Child custody decisions under customary law in patrilineal communities in Commonwealth Africa favor the father and the father's family.¹⁹⁷ Under customary law in many countries with patrilineal systems, the father takes custody of any non-infant children, because children resulting from marriage are considered part of the father's extended family.¹⁹⁸ In some cases, the payment of bridewealth is dispositive in determining custody under customary law,¹⁹⁹ because traditionally,

family elders, men's exclusive property rights often leave women with nothing, particularly when family elders determine that a women is at fault in a divorce.").

189. ANGLOPHONE AFRICA, *supra* note 126, at 43.

190. Sam, *supra* note 46, at 212 ("When women's parents are unable to return the dowry money, women cannot escape bad or abusive marriages.").

191. See, e.g., Davies, *supra* note 68, at 19; Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1577 (2006).

192. Ghana's Matrimonial Causes Act allows women and men in customary marriages to petition the formal courts to apply the provisions of the Act subject "to the peculiar incidents of that marriage." ANGLOPHONE AFRICA, *supra* note 126, at 43.

193. TICHAGWA, *supra* note 44, at 20.

194. *Id.*

195. Johanna Bond, *Introduction to Chapter Three: Women's Rights Within the Family*, in VOICES OF AFRICAN WOMEN, *supra* note 4, at 184.

196. *Id.* at 184-85.

197. Regina Lule Mutyaba, *Comparative Study of the Status of Women Under the Law of Divorce and of Their Economic Status in Uganda, Britain, and Bangladesh*, in VOICES OF AFRICAN WOMEN, *supra* note 4, at 218, 227 ("[I]n patrilineal Uganda, children belong to the husband and courts award custody accordingly.").

198. See U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Third, Fourth, and Fifth Periodic Reports of States Parties: Ghana*, art. 207, CEDAW/C/GHA/3-5 (Apr. 18, 2005).

199. See LETUKA ET AL., *supra* note 36, at 26; Fareda Banda, *Custody and the Best Interests of*

payment served “as a mechanism for the lineage and affiliation of a child to the father.”²⁰⁰

Under statutory law, many courts strive to award custody of a minor child to the parent who will best provide for the child’s welfare. The Gambia, Lesotho, and Malawi are among the countries that use a “best interest of the child” standard to determine custody.²⁰¹ Judges tend to interpret the “best interest of the child” in terms of material welfare such as a child’s living conditions, medical care, and opportunities for education.²⁰² A 1994 case from South Africa broadened this interpretation to the child’s “physical, moral, emotional, and spiritual welfare.”²⁰³ In Zimbabwe, the primary matter discussed in determining the best interest of the child is who the caretaker would be and how well that person would accomplish the task.²⁰⁴

Customary law generally makes no provision for spousal maintenance after divorce.²⁰⁵ Zimbabwe’s 1982 Customary Law and Primary Courts Amendment Act, however, “imposes a duty on the husband of a woman under customary law to maintain his wife or ex-wife until her remarriage or death.”²⁰⁶ In contrast to customary law, statutory law in the region tends to recognize a duty to maintain former spouses.²⁰⁷ Tanzania’s Law of Marriage Act includes maintenance for women after divorce.²⁰⁸ In most Commonwealth African countries where spousal maintenance is available under statutory law, the woman’s subsequent remarriage will extinguish

the Child: Another View from Zimbabwe, in *THE BEST INTERESTS OF THE CHILD* 197, 197 (Philip Alston ed., 1994) (noting that “[t]he question of whether or not *lobolo* has been paid still tends to influence the Community Courts’ decisions”).

200. LAW REFORM COMM’N OF TANZ., REPORT OF THE COMMISSION ON THE LAW OF SUCCESSION/INHERITANCE 7 (1995).

201. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Second, Third, Fourth, and Fifth Periodic Report of States Parties: Malawi*, art. 83 CEDAW/C/MWI/2-5 (June 28, 2004); U.N. Comm. on the Elimination of Discrimination Against Women, *Combined Initial, Second, and Third Periodic Reports of States Parties: Gambia*, art. 43, CEDAW/C/GMB/1-3 (Apr. 10, 2003); LETUKA ET AL., *supra* note 36, at 26.

202. Athaliah Molokomme & Keletso Mokobi, *Custody and Guardianship of Children in Botswana: Customary Laws and Judicial Practice within the Framework of the Children’s Convention*, in *LAW, CULTURE, TRADITION AND CHILDREN’S RIGHTS IN EASTERN AND SOUTHERN AFRICA* 191, 194 (Welshman Ncube ed., 1998).

203. Nazeem Goolam, *Constitutional Interpretation of the “Best Interests” Principle in South Africa in Relation to Custody*, in *THE CHANGING FAMILY: INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW* 372 (John Eekelaar & Thandabantu Nhlapo eds., 1998) (quoting *McCall v. McCall*, 1994 (3) SA 201 (CC) at 205 (S. Afr.)).

204. See Alice Armstrong, *School and Sadza: Custody and the Best Interests of the Child in Zimbabwe*, in *THE BEST INTERESTS OF THE CHILD*, *supra* note 197, at 160.

205. In Nigeria, for example, “divorce under customary law terminates all rights of spousal maintenance.” *ANGLOPHONE AFRICA*, *supra* note 126, at 84; see also ALICE ARMSTRONG, *STRUGGLING OVER SCARCE RESOURCES: WOMEN AND MAINTENANCE IN SOUTHERN AFRICA* 48 (1992).

206. See *WOMEN & LAW IN S. AFR. RES. PROJECT, MAINTENANCE IN ZIMBABWE* 37 (1991) (discussing the evolution of maintenance rights under common law).

207. *ANGLOPHONE AFRICA*, *supra* note 126, at 141 (“The Matrimonial Causes Act empowers courts to . . . provide for the maintenance of spouses and children.”).

208. Calaguas et al., *supra* note 42, at 501-02.

the right to maintenance.²⁰⁹ Recent legislation in some countries requires parents to provide maintenance for their children, including those born outside of the marriage.²¹⁰

3. Widowhood

The death of a spouse can be emotionally, physically, and financially devastating for women in Commonwealth African countries. In addition to the trauma of losing a loved one, widows in some regions face the possibility of widow inheritance, or levirate marriage, in which a widow is forced to marry the brother or another male relative of her deceased husband.²¹¹ Traditionally, levirate marriage provided a vehicle through which the husband's family could financially support the widow and her children.²¹² Today, the practice is sometimes seen as a way for the husband's family to access any wealth the deceased acquired during his life and to provide sexual access to the deceased's wife.²¹³

High rates of HIV infection make the tradition particularly dangerous for widows.²¹⁴ Some communities also practice "widow cleansing," in which custom dictates that a widow must undergo a cleansing ritual after the death of her husband.²¹⁵ Some rituals require the widow to have sexual intercourse with one or more men to cleanse the widow of omens or witchcraft.²¹⁶ Given the risk of HIV infection, the practice severely jeopardizes women's health.²¹⁷

In some countries, widows experience "property grabbing," which occurs when relatives of the deceased husband come into the widow's home and confiscate some or all of the moveable property.²¹⁸ Sometimes the widow is forced to abandon the marital home and all of her belongings.²¹⁹ In communities that allow property grabbing, it is not

209. WOMEN & LAW IN S. AFR. RES. PROJECT, *supra* note 206, at 41.

210. See LOPI ET AL., *supra* note 146, at 83 (describing the 2003 Namibian Maintenance Act).

211. Kenneth Kaoma Mwenda, *African Customary Law and Customs: Changes in the Culture of Sexual Cleansing of Widows and the Marrying of a Deceased Brother's Widow*, 11 GONZ. J. INT'L L. 1, 3 (2007).

212. See Laurel L. Rose, *Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation*, 13 TEX. J. WOMEN & L. 197, 210 (2004).

213. Mwenda, *supra* note 211, at 14-15.

214. *Id.* at 20 ("Some people believe the practice contributes to the spread of HIV in sub-Saharan Africa, where about 25 million people are HIV-positive and about 60% of them are women.").

215. *Id.* at 9 ("[L]ocal members of the Ndanga village maintain that sexual cleansing of widows is an indispensable custom and believe in upholding tradition . . . ; the belief being that a widow who has not been sexually cleansed is haunted by the spirit of her deceased spouse until she has been cleansed by the relatives of the deceased.").

216. Maria Tungaraza, *Women's Rights and the AIDS Epidemic in Tanzania*, in VOICES OF AFRICAN WOMEN, *supra* note 4, at 301, 304.

217. Mwenda, *supra* note 211, at 3.

218. See Rachel C. Loftspring, *Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda*, 29 U. PA. J. INT'L L. 243, 248 (2007).

219. See Mwenda, *supra* note 209, at 3.

uncommon for women to be left destitute after the death of a husband.²²⁰

The marital rights women enjoy and the marital indignities that they endure vary significantly depending on local community practices, the extent to which the state has injected itself into marriage regulation, and the extent to which women opt for state rather than community control over their marriages. In the last several decades, marriage legislation within the Commonwealth has tended to carve out incrementally larger segments of family law for state rather than community regulation. Despite the legislative trend toward greater statutory regulation of marriage and family, however, communities continue to have a strong hold on the customs and traditions that regulate entrance into the community through customary marriage. Indeed, the rates of customary marriage surpass those of statutory marriage in many Commonwealth African countries. As such, the promotion of marriage equality through legislation is slow at best, particularly in areas where legal literacy is low and the influence of custom and tradition is strong.

II. VALUES ANIMATING REFORM: CULTURE, EQUALITY, AND AGENCY

A. Underlying Values

Two primary societal values form the backdrop for the debates on marriage reform in much of Commonwealth Africa. These values, the preservation of culture and the promotion of equality, are at times mutually reinforcing and at times competing. Recent constitutional reforms in many Commonwealth African countries reflect a commitment to gender equality.²²¹ Ugandan scholar Sylvia Tamale has illustrated how some cultural traditions support women's equality.²²² Tamale cites a *Ssenga* practice in which the paternal aunts of a new bride provide sexual instruction to her prior to her wedding.²²³ Although traditionally focused on the provision of male sexual pleasure, more recently the practice has served as a vehicle for women's sexual empowerment.²²⁴ Other cultural

220. Richardson, *supra* note 9, at 19.

221. See, e.g., Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307, 327-28 (describing the Bill of Rights in the South African Constitution).

222. See Sylvia Tamale, Faculty of Law, Makerere Univ. (Uganda), Presentation at the African Feminist Forum: 'African Feminism' Taking a 'Cultural Turn' 3 (Nov. 15, 2006).

223. *Id.* at 10. In a presentation to the 2006 African Feminist Forum, Sylvia Tamale notes, "Through a socio-cultural analysis of the institution of *Ssenga* (sexual initiation by the paternal aunt), I discovered how the evolution of *Ssenga* practices has allowed Baganda women to negotiate agency, autonomy and self-knowledge about their sexuality." REPORT OF THE AFRICAN FEMINIST FORUM 12 (2006), available at <http://www.africanfeministforum.com/wp-content/uploads/2010/10/AFF-2006-Report.pdf>.

224. *Id.* ("Explicit and daring topics regarding women's pleasurable sexuality . . . have become part of *Ssenga*'s repertoire of tutoring techniques. While the traditional message from *Ssenga* focused on men's sexual pleasure, young Baganda women today are demanding that men also receive training in how to please their female partners.").

traditions, such as FGM, are clearly in tension with women's equality.²²⁵ Marriage often involves rituals; it reflects customs and traditions that are central to the communities celebrating the marriage.²²⁶ Marriage is also a site of contestation, in which women and men define themselves both according to and, at times, in contradistinction to expected roles.²²⁷

Marriage has historically fostered women's subordination within the family.²²⁸ Feminists around the globe have begun to dismantle the public/private divide, subjecting marriage and the family to public scrutiny in important ways.²²⁹ As a result, most states, including many in Commonwealth Africa, see marriage as an appropriate political space within which to intervene to promote gender equality. Marriage, however, remains a contested space, where both traditional gender roles and gender equality find expression to varying degrees. Both the preservation of culture and the promotion of gender equality animate the discourse surrounding the reform of marriage law in the region.

Around the world, contemporary discourse regarding cultural norms is punctuated with "challenges by individuals within a culture to modernize, or broaden, the traditional terms of cultural membership."²³⁰ The success of these reform efforts depends, in part, on the use of law to either squelch or facilitate dissent. Madhavi Sunder contrasts these approaches, characterizing them as "cultural survival" and "cultural dissent," respectively. As Sunder explains, "[c]ultural survival' measures often end up impeding internal reform efforts to contest discriminatory or repressive

225. See, e.g., INTERAGENCY STATEMENT, *supra* note 97, at 9. ("Female genital mutilation violates a series of well established human rights principles, norms and standards . . .").

226. See Päivi Koskinen, *To Own or to Be Owned: Women and Land Rights in Rural Tanzania*, 2002 HUM. RTS. DEV. Y.B. 145, 153-54 (2002) (explaining that "[c]ustomary laws related to the various aspects of family life are based on the social relations between men and women or, more specifically, on relations between husbands and wives: these are the unwritten social rules and structures of a community, which derive from shared values and traditions").

227. Marjorie Weinzwieg, *Should a Feminist Choose a Marriage-Like Relationship?*, 1 HYPATIA 139, 142 (1986) (noting also that "the rigid distribution of roles in traditional marriage and the personality characteristics which women have had to develop in order to fulfill these roles have made it very difficult for women to develop themselves as individuals with interests and ideas separate from those of the members of their families").

228. See, e.g., *id.* at 141-42 ("[I]n traditional marriage, the woman was treated as the man's sexual and economic property. . . . [T]he relationship between the partners is that of domination and exploitation rather than one based on respect for persons and equality."); Margot Lovett, *"She Thinks She's Like a Man": Marriage and (De)constructing Gender Identity in Colonial Buha, Western Tanzania, 1943-1960*, in "WICKED" WOMEN AND THE RECONFIGURATION OF GENDER IN AFRICA 47, 53 (Dorothy L. Hodgson & Sheryl A. McCurdy eds., 2001) ("[F]emales never would shed their subordinate position. Regardless of age, women would perpetually be jural minors, subject first to the authority of their fathers, then to that of their husbands, and, eventually, to that of their sons. Thus, they learned that their subordination was a life-long condition.").

229. Rhonda Copelon, *Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women & Feminist Law-Making* by Elizabeth Schneider, 11 AM. U. J. GENDER SOC. POL'Y & L. 865, 867 (2003) (recalling how feminists challenged "the public/private distinction," and asserted that "basic human rights principles include certain positive state responsibilities that should apply to private gender violence").

230. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 495 (2001).

cultural norms.”²³¹ Cultural survivalists use the law to suppress dissent in the name of preserving a static vision of culture and tradition and often at the expense of women seeking to assert gender equality rights within a given culture.²³²

By contrast, “‘cultural dissent’ . . . recognizes that cultures are changing, in some ways for the better.”²³³ Cultural dissent encourages progressive voices to challenge and redefine cultural norms, including those that determine marital roles and expectations. It is this tension between the preservation of culture and the promotion of equality within culture, or between cultural survival and cultural dissent, that animates the debates concerning the reform of marriage law in the African Commonwealth.

Sunder argues that “[w]e ought to ensure that legal efforts to counter globalization and modernization do not buttress the hegemony of cultural elites and suppress efforts by cultural dissenters to gain autonomy and equality within their cultural context.”²³⁴ Likewise, I have suggested elsewhere that some recent regional human rights mechanisms offer “largely unexplored procedural, dialogical rights that have the potential to engage women in the public discourse that shapes African customary law.”²³⁵ This kind of facilitated dialogue, therefore, creates the space for cultural dissenters.

B. Colonialism and the Preservation of Culture

Although Commonwealth African societies had plural legal systems in the pre-colonial era, colonialism brought a new, Eurocentric version of pluralism to the continent.²³⁶ In most Commonwealth African countries, British common law applied to Europeans, and customary law applied to the indigenous population in certain areas like family law.²³⁷

Colonial authorities considered customary law to be inferior to the statutory or “received” British law.²³⁸ According to the South African Law

231. *Id.* at 500.

232. *Id.*

233. *Id.* at 500-01.

234. *Id.* at 504.

235. Bond, *Gender, Discourse*, *supra* note 12, at 512.

236. See Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 869-70 (1988) (“For proponents of empire in the nineteenth century, this imposition of European law was a great gift, substituting civilized law for the anarchy and fear that they believed gripped the lives of the colonized peoples. . . .”).

237. ANNE M.O. GRIFFITHS, IN THE SHADOW OF MARRIAGE: GENDER AND JUSTICE IN AN AFRICAN COMMUNITY 33-34 (1997) (explaining that “[t]he rationale behind” the separate jurisdictions for British common law and customary law “was that the Africans were to be left to run their own affairs except where these might come into conflict with the interests of colonial powers”).

238. See Merry, *supra* note 236, at 890 (“During the nineteenth and early twentieth centuries, British law represented to the colonizers in India and Africa a substantial advance over the ‘savage’ customs of the colonized.”); Justice Modibo Ocran, *The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa*, 39 AKRON L. REV. 465, 470

Reform Commission, colonial authorities viewed customary law as “inferior, only to be tolerated ‘in areas of marginal significance to the colonial regime’ and only to the extent that it was useful as an instrument of colonial rule.”²³⁹ Colonial authorities in South Africa devalued customary law and invalidated it when they considered it to be incompatible with “general principles of humanity observed throughout the civilized world.”²⁴⁰ South African legislation in 1864 allowed Africans who were – in the words of the colonial authorities – sufficiently “detrribalized . . . to apply for exemption from the application of customary law.”²⁴¹

Despite the creation of dual systems of law in which customary law applied to the family law disputes of the indigenous African population, the customary law that the colonial authorities applied when called upon to do so reflected the interpretation of the colonial authorities and the male indigenous elites with whom they collaborated.²⁴² Customary law today thus reflects an amalgam of tradition and colonial influence.

Two important values emerged within the postcolonial state: state sovereignty and the preservation of indigenous African culture and tradition. Not surprisingly, post-colonial states keenly protected their sovereignty.²⁴³ As newly independent states, many leaders were also concerned about democracy and human rights. This balance between tradition and modernity is evident in the drafting of the African Charter on Human and Peoples’ Rights.²⁴⁴ The drafters of the Charter attempted to create a treaty that reflected both a basic commitment to human rights and “African circumstances and sensibilities.”²⁴⁵

Having suffered under European occupation, postcolonial states also

(2006) (“In colonial Africa, the merger of the two cultures occurred as the British accepted customary law to some extent, but also riddled it with so-called repugnancy clauses, in order to avoid those aspects of African customs that European culture found most appalling, ridiculous, or simply unhelpful to the inculcation of Christian ideals.”).

239. Evadné Grant, *Human Rights, Cultural Diversity and Customary Law in South Africa*, 50 J. AFR. L. 2, 14 (2006) (quoting S. AFR. LAW REFORM COMM’N, THE HUMANIZATION OF COMMON LAW AND THE INDIGENOUS LAW 10 (1999)).

240. *Id.* at 13 (citation omitted).

241. *Id.* (citation omitted).

242. See Martin Chanock, *Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT’L J.L. & FAM. 72, 77 (1989) (“It is important that we understand the input of the colonial courts and administrators and missionaries into the fashioning of the customary law of marriage, and that we avoid treating the development of African family law as if it was isolated from the dominant ‘white’ system. Once we understand the modern customary law as the product of this interaction during the colonial period, it again becomes harder to invoke custom in opposition to reform.”).

243. See Adrien Katherine Wing & Tyler Murray Smith, *The New African Union and Women’s Rights*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 33 (2003) (describing states’ insistence on sovereignty during the post-colonial establishment of the Organization for African Unity (OAU), followed by the African Union (AU)).

244. Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States’ Obligations Under the African Human Rights Charter*, 40 STAN. J. INT’L L. 105, 110 (2004).

245. EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 93-94 (2001).

zealously guarded indigenous culture and tradition.²⁴⁶ Customary law is seen as the legal expression of culture and tradition and is valued on that basis. As Fareda Banda notes, “part of the struggle for independence was so that Africans could reclaim their much derided culture, thus the resistance to the perceived re-imposition of European values in the guise of human rights norms.”²⁴⁷

C. Constitutionalism and the Promotion of Equality

Drafters of the postcolonial constitutions and later constitutional iterations undoubtedly felt a tension between preserving the culture and traditions that were threatened under colonial rule and the promise of human rights and democracy, including gender equality.²⁴⁸ Many of the constitutions that were drafted during the 1990s, during a wave of constitutional activity, include gender equality provisions.²⁴⁹ Some of these equality provisions, however, are limited in their breadth, making them less effective in the pursuit of gender equality.²⁵⁰

In a handful of Commonwealth African countries, the constitutional text specifically excludes family or customary law from the purview of the constitutional non-discrimination clause.²⁵¹ These “exclusionary clauses” reflect the tension between the preservation of custom and culture and notions of gender equality.²⁵² In Zimbabwe, the presence of an exclusionary clause in the constitution led the Supreme Court to conclude, in the *Magaya* case, that a customary inheritance law that denied a woman’s right to inherit on the basis of her gender did not violate the constitutional non-discrimination clause, because issues of inheritance were specifically excluded from constitutional non-discrimination protection.²⁵³

In other countries, customary law is explicitly valued as a source of law but is nevertheless subject to the Bill of Rights.²⁵⁴ In South Africa in 2008, the Constitutional Court held that traditional authorities had the right to develop the customary law in conformity with the Constitution.²⁵⁵ In so

246. See Koskinen, *supra* note 226, at 156 (“The customs and traditions of a given people have political significance for the African states, as they may also act as a symbol of cultural identity in the post-colonial era.”).

247. Fareda Banda, *Global Standards: Local Values*, 17 INT’L J. L. POL’Y & FAM. 1, 7 (2003).

248. See, e.g., Wing & Smith, *supra* note 241, at 58 (“It appears that the [African] Charter was conflicted from the beginning given its attempt to reconcile deep-seated African values (which arguably subjugate women’s gender roles) and the emerging global values of non-discrimination and gender equality.”).

249. See Andrews, *supra* note 221, at 315.

250. Bond, *Constitutional Exclusion*, *supra* note 12, at 291.

251. *Id.*

252. See *id.* at 306-07.

253. *Magaya v. Magaya* 1999 3 L.R.C 35, 40 (Zimb. Sup. Ct.); see also Valerie Knobelsdorf, *Zimbabwe’s Magaya Decision Revisited: Women’s Rights and Land Succession in the International Context*, 15 COLUM. J. GENDER & L. 749, 760-61 (2006).

254. See, e.g., Tracy E. Higgins, *Constitutional Chicken Soup*, 75 FORDHAM L. REV. 709, 711 (2006).

255. *Shilubana & Others v. Nwamitwa*, 2008 (2) SA 66 (CC) at para. 85 (S. Afr.).

doing, the Court ruled that the Royal family of the Valoyi in Limpopo had the right to designate a woman, Ms. Tinyiko Shilubana, as successor to the chieftaincy title.²⁵⁶ In another case in South Africa, *Bhe v. Magistrate, Khayelitsha*, the Constitutional Court also held that a woman could inherit property upon the death intestate of her father, contrary to local customary law.²⁵⁷

In the Zimbabwe case of *Magaya* and the South African cases of *Bhe* and *Shilubana*, the respective courts struggled with the tension between the preservation of culture and custom and the promotion of equality norms within culture. In many ways, the Zimbabwean case represents Sunder's "cultural survival" approach, while the *Bhe* and *Shilubana* cases represent, in Sunder's terms, a "cultural dissent" approach.²⁵⁸ The Zimbabwean Constitution thus shields customary and family law from constitutional challenge and impedes cultural dissent, whereas the South African text offers a textual source for dissenting voices.

D. Agency and Choice

Marriage is an expression of entrenched social values throughout the world, including in Commonwealth Africa.²⁵⁹ Removing the state from its regulatory role, therefore, will not likely deter marriage in the region but will narrow the range of marriage options. Within plural legal systems in which couples choose to marry according to statutory, customary, or religious law, withdrawal of the state from marriage regulation would effectively eliminate the choice of civil marriage, leaving customary and religious marriage as the options for those seeking to marry. Because marriage is a particularly highly valued institution in Commonwealth Africa, if the state were to regulate intimate relationships through the law of contract – as some feminists in the global North have suggested – many couples would simply opt for customary or religious marriage instead. Although the level of state engagement with customary marriage varies by country, generally the state has little formal oversight over customary marriages.²⁶⁰ Removal of state regulation would mean that customary and religious law would exclusively govern women's rights within marriage.

256. Editorial, *A Female Child Can Inherit Her Father's Chieftaincy Title*, ALLIANCES FOR AFR. (July 29, 2008), http://www.alliancesforafrica.org/editorial.asp?page_id=137.

257. *Bhe and Others v. Khayelitsha Magistrate & Others* 2004 (1) SA 580 (CC) (S. Afr.) (holding that male primogeniture is unconstitutional as it discriminates unfairly against women).

258. See Sunder, *supra* note 230, at 500-01.

259. See, e.g., Lovett, *supra* note 41, at 289 ("Pressure [to marry] was brought to bear on them not only from their own families, but from the wider community as well.").

260. By way of example, the Matrimonial Causes Act in Ghana primarily envisions a role for traditional leaders in the dissolution of customary marriages. The Act, however, allows the formal courts to hear a customary divorce upon application by one of the parties. Couples in customary marriages rarely invoke this provision and rely primarily on customary dissolution. See Ulrike Wanitzek, *Integration of Personal Laws and the Situation of Women in Ghana: The Matrimonial Causes Act of 1971 and Its Application by the Courts*, 1991 THIRD WORLD LEGAL STUD. 75, 79 (1991).

Given the patriarchal social and legal structures in Commonwealth Africa, to what extent can women exercise real choice in selecting a marriage regime? For many women, the choice of marriage systems is constrained by the patriarchal social context within which the exercise of “choice” occurs.²⁶¹ The choice of marital regimes is, in fact, often made by the families of the couple rather than the couple themselves.²⁶² In these cases, women experience a lack of decisional authority at the hands of both the older generation and the future husband.

The choice here is not consistent with liberalism, which “posited a subject whose humanity consisted in her theoretically unlimited potential, and her capacity to exercise meaningful choice in the direction of her own life.”²⁶³ Kathryn Abrams’ theory of partial agency “seeks to describe a subject whose agency emerges against the backdrop of, and co-exists in tension with, systemic gender-based oppression.”²⁶⁴ This notion of partial agency recognizes that women cannot be defined purely as victims of their culture; they act against and resist gender-based oppression even as they experience it and internalize it in their daily lives.

Within Commonwealth African countries, women’s ability to exercise agency in pursuit of a more liberal marital regime depends to some extent on geography. Women in rural areas are less likely to be aware of the option to choose statutory marriage law or are unable to access the formal civil legal system. In rural areas of Ghana, for example, “the problems of distance, poor transportation facilities, travel costs, use of an unknown court language (English), highly formalized and therefore unintelligible court procedures, court fees, and the cost of legal representation” are obstacles for women seeking to access the civil legal system.²⁶⁵ Social pressure in rural areas also serves as a disincentive to opt out of customary or religious marriages.²⁶⁶

In many Commonwealth African countries, the majority of couples choose to marry according to customary law.²⁶⁷ In some cases, couples enter into a civil marriage and celebrate the marriage according to custom as well, leading to an informal hybrid marriage.²⁶⁸ According to one

261. See, e.g., Andrews, *supra* note 12, at 368-69 (remarking that “[t]he reality is that women’s continuing subordinate status in South Africa curtails the free exercise of her choice in a range of situations, including whom she chooses to marry.”).

262. See, e.g., Higgins et al., *supra* note 68, at 1671-72 (“The most clear-cut example of family control is when the family enters into marriage negotiations without the knowledge, much less the consent, of either individual.”).

263. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 326 (1995).

264. *Id.* at 333.

265. Wanzek, *supra* note 259, at 85.

266. *Id.* (“[I]t is not always easy for somebody who is living in the traditional setting to escape the framework of customary law as applied in the local community, and to seek a relief in the state court which is not accepted under the local customary law.”).

267. See, e.g., Elsje Bonthuis & Natasha Erlank, *The Interaction Between Civil and Customary Family Law Rules: Implications for African Women*, 1 J. S. AFR. L. 59, 60 (2004).

268. Bolaji Owasanoye, *The Regulation of Child Custody and Access in Nigeria*, 39 FAM. L. Q.

estimate, approximately eighty percent of marrying couples in Ghana marry under customary law.²⁶⁹ Eliminating the statutory marriage regime, therefore, would appear to have a minimal impact on the majority of women in marriages.

These facts notwithstanding, the choice to marry according to civil law serves two important expressive functions. First, for those who are able to meaningfully “choose” despite patriarchal constraints on agency, the choice of civil marriage may signify an act of resistance. A couple’s decision to marry according to statutory law expresses, among other things, a desire for a more egalitarian vision of marriage. In countries where the majority of women marry according to customary or religious law, the minority of women who choose civil marriage exercise partial agency and constitute examples of Sunder’s cultural dissenters. Second, the provision of a statutory alternative to customary or religious marriage expresses the state’s intention to offer a more egalitarian vision of marriage. Of course, there is often a substantial gap between the more egalitarian vision of marriage expressed in statutes and the realities of marriage as experienced in the daily lives of women.²⁷⁰ Nevertheless, the existence of a state-sponsored marriage alternative that seeks to promote equality, even one that falls short of that goal, signals that equality is a valued social good.

The choice to marry according to civil law is a complex one fraught not only with issues of cultural identity and self-assertion but also with issues of colonialism. Because statutory family law was introduced during the colonial period and initially applied only to colonial authorities, the statutory marriage regime has retained some colonial undertones. As Ulrike Wanitzek suggests in the context of Ghana, “the [civil] marriage is seen as the ‘white man’s system of marriage.’”²⁷¹ This racial coding may make it more complicated for women to opt for statutory marriage.

Those women who exercise agency by opting out of customary or religious marriage regimes do so for a variety of reasons, including the perception that statutory regimes offer greater rights protection for women in marriage, which is often but not always the case.²⁷² Were the state to

405, 408 (2005) (describing the trend in Nigeria, “particularly predominant among educated couples, . . . to first perform a customary or Islamic marriage, with all of its prescribed incidents, followed by a church or registry wedding that is statutory and monogamous in nature”).

269. Fenrich & Higgins, *supra* note 5, at 284.

270. See Higgins et al., *supra* note 68, at 1677-78 (“This understanding of man as head of the household and a rejection of norms of equality in the home was echoed in many interviews with women themselves. For example, in GaMatlala, one woman explained that ‘in our homes the husband is master, we don’t want to be in charge of the home.’ Another added that ‘we agree that the Constitution says that equality exists, but in our home we want to follow our customs.’”).

271. Wanitzek, *supra* note 259, at 82.

272. See Garton Sandifolo Kamchedzera, *Malawi: Improving Family Welfare?*, 32 U. LOUISVILLE J. FAM. L. 369, 372 (1993) (“Some Africans deliberately ignore the customary marriage system for the security the monogamous common-law-based marriage is believed to offer due to the difficulty in dissolving such a marriage. However, in a society where the

withdraw from marriage regulation, making customary or religious law the *de facto* marriage regime, it would remove an important avenue for women to exercise agency in defining the contours of the marital relationship and its corresponding rights and duties. The option to exercise agency in this way has a very real impact on women who exercise the option and serves an important expressive function even for those who do not.

Thus, removing the state from marriage regulation entirely would effectively cede control over all aspects of marriage to local communities. Although the cultural constraints on women's agency in the choice of marital regime are significant, it is important to preserve meaningful choice for those fortunate enough to be able to exercise it. Moreover, the choice of marital regimes has symbolic and expressive value, offering women an alternative vision of marriage that may incrementally alter gender roles over the course of generations.

III. JUSTIFIABLE STATE INTERFERENCE

A. Questioning the State's Role in Marriage

A number of scholars in the global North have recently advocated a limited role for state oversight of marriage.²⁷³ Martha Fineman has argued that the state should extricate itself from marriage regulation entirely, leaving couples to negotiate a contract that would govern the rights and responsibilities of their relationship.²⁷⁴ Others have advocated for a limited role for the state in overseeing a registration system that would allow couples to register a variety of intimate relationships, including but not limited to conjugal relationships.²⁷⁵ Some commentators have suggested that retaining marriage for opposite-sex couples and adding a civil union status for same-sex couples is the most politically viable approach.²⁷⁶ Still others have argued for retaining marriage but extending it to include same-sex couples.²⁷⁷ Although the level of state involvement in the regulation of intimate relationships remains a hotly contested issue, a number of feminists envision a shrinking role for the state as regulator.

In contrast, I argue that in Commonwealth Africa, the state should have

literacy rate is very low, the knowledge of the advantages offered by the different family legal systems is limited.").

273. See generally Solot & Miller, *supra* note 1.

274. Fineman, *supra* note 2, at 57 (arguing that "adults should be free to fashion the terms of their own relationships and rely on contract as the means of so doing, effectively replacing the marital status with actual negotiation and bargaining building on the increased acceptance of premarital agreements.").

275. See, e.g., LAW COMM'N OF CAN., *supra* note 15, at 122 ("Governments should attempt to design their international arrangements on the basis of the existence of a variety of relationships and move toward an international recognition of registrations.").

276. See James L. Musselman, *What's Love Got to Do With It? A Proposal for Elevating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37, 74 (2009).

277. See, e.g., McClain, *supra* note 15, at 107-08.

a more expansive role in the regulation of marriage. I conclude that continued state regulation of marriage is critically important for Commonwealth African women's rights within marriage. International human rights law presumes a role for the state in the protection of women's rights within marriage.²⁷⁸ Under human rights law, states enter into treaties binding them to uphold the human rights provisions therein.²⁷⁹ African states have a crucial role to play in enhancing gender equality within marriage; indeed, many are bound to do so under international human rights law.²⁸⁰

At first blush, removal of the state from marriage regulation may appear to promote a neutral, non-interventionist approach. Other commentators claim that removal of the state from marriage regulation simply promotes multiculturalism in pluralist states. Both arguments, however, are flawed. Leaving customary and religious law to govern family relations promotes a particular normative approach to governing the family, one that facilitates rather than challenges women's subordination. It is far from a neutral and innocuous approach.²⁸¹ Similarly, it goes beyond simply promoting multiculturalism. This approach of invalidating state regulation of marriage in the name of multiculturalism sacrifices women's equality within the family.²⁸²

B. Equality Within Relationships: The State's Role

1. Human Rights Framework

International human rights treaties such as CEDAW directly address the state's role in promoting equality within marriage.²⁸³ All of the Commonwealth African countries have ratified CEDAW.²⁸⁴ Article 16 of CEDAW requires States Parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" and specifically obligates states to take action in

278. CEDAW, *supra* note 16, arts. 2, 16.

279. See Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 147 (1994).

280. States that have ratified CEDAW without reservation to article 16 are bound to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . ." CEDAW, *supra* note 16, art. 16.

281. Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1403-04 (2003) ("Just as we 'pierce the veil' of corporate sovereignty in cases of injustice or fraud, women activists are asserting a right to confront oppressive laws and practices otherwise legally shielded in the name of religion.").

282. See generally Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49 (2005).

283. CEDAW, *supra* note 16, art. 16.

284. For a list of countries that have ratified CEDAW, see *Status of Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Feb. 21, 2011).

certain areas to promote equality within the family.²⁸⁵ International human rights treaties have long recognized the state's interest in regulating marriage.²⁸⁶ Several treaties require states to establish a minimum age for marriage, thereby protecting a particularly vulnerable population from the physical and emotional toll of early marriage.²⁸⁷ The same treaties also require that states ensure that the parties enter into the marriage with "full and free consent."²⁸⁸

Some states undermine Article 16's obligations to promote equality within marriage by issuing reservations to the Article.²⁸⁹ Although the CEDAW Committee has made it clear that it considers reservations to Article 16 contrary to the object and purpose of the treaty,²⁹⁰ such reservations persist and hamper implementation of the treaty.²⁹¹ None of the Commonwealth African countries have entered reservations to Article 16 of CEDAW.²⁹²

Regional instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women ("the Protocol") also provide protection against gender-based rights violations within the family.²⁹³ Article 6 of the Protocol requires states to "ensure that women and men enjoy equal rights and are regarded as equal partners in marriage," including marriage requirements concerning consent, minimum age, registration of marriages, choice of domicile, choice of name, nationality, nationality and education of children, and property rights.²⁹⁴

285. CEDAW, *supra* note 16, art 16.

286. See generally Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231.

287. See, e.g., *id.* art. 2 ("States Parties to the present Convention shall take legislative action to specify a minimum age for marriage.").

288. *Id.* art. 1 ("No marriage shall be legally entered into without the full and free consent of both parties . . .").

289. See Vedna Jivan & Christine Forster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women's Use of CEDAW*, 9 SING. Y.B. INT'L L. 103, 108 (2005).

290. See Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 323-24 (2007).

291. See Anne F. Bayefsky, *General Approaches to the Domestic Application of Women's International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 351, 352 (Rebecca J. Cook ed., 1994) ("Many of the substantive reservations are wide ranging and profoundly affect the integrity of the Convention.").

292. For a complete list of reservations to CEDAW by country, see *Declarations, Reservations and Objections to CEDAW*, U.N. DIV. FOR THE ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Feb. 21, 2011).

293. The following Commonwealth countries have ratified the Protocol: The Gambia, Ghana, Lesotho, Malawi, Mozambique, Namibia, Nigeria, Seychelles, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe (although Zimbabwe withdrew from the Commonwealth in 2003). Joseph Olanyo, *Uganda: Country Ratifies Protocol on African Women Rights*, ALLAFRICA (Aug. 3, 2010), <http://allafrica.com/stories/201008031178.html>.

294. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 6, July 11, 2003, OAU Doc. CAB/LEG/66.6 (entered into force Nov. 25, 2005), available at http://www.achpr.org/english/_info/women_en.html [hereinafter Protocol on the Rights of Women].

Since the early 1990s, international human rights instruments have recognized the state's interest in prohibiting violence against women, both inside and outside of marriage.²⁹⁵ Traditionally, international human rights law focused on rights violations that occurred in the "public" sphere.²⁹⁶ Violations of human rights that occurred in the home, or "private sphere," at the hands of private actors rather than representatives of the state, were not subject to scrutiny under human rights law.²⁹⁷

Because international human rights law generally imposes obligations on states rather than private actors,²⁹⁸ scholars and activists struggled in the 1980s and early 1990s to expand the notion of state responsibility to include violations against women in the so-called private sphere.²⁹⁹ One such scholar, Celina Romany, argued for condemning "a human rights framework that construes the civil and political rights of individuals as belonging to public life while neglecting to protect the infringements of those rights in the private sphere of familial relationships."³⁰⁰

Many of the international human rights instruments that were promulgated in the early 1990s thus reflected an expanded understanding of state responsibility that included the responsibility "to ensure the prevention, investigation, and punishment" of gender-based human rights violations that occurred in private as well as public realms.³⁰¹ International instruments such as the Declaration on the Elimination of Violence Against Women (DEVAW) also prohibit states from invoking custom and tradition as a justification for violence against women.³⁰²

Regional instruments, such as the Protocol on the Rights of Women in Africa, also address violence against women. Article 4 of the Protocol provides that states must take steps to "adopt . . . legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence

295. See generally U.N. Secretary-General, *Ending Violence Against Women: From Words to Action*, U.N. Sales No. E/06/IV/8 (2006).

296. *Id.*

297. *Id.*

298. See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 148 (2000).

299. See Johanna Bond, *Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 88 (2003) (describing the expansion of state responsibility to include private actors).

300. Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 291, at 85.

301. See Radhika Coomaraswamy & Lisa M. Kois, *Violence Against Women*, in 1 WOMEN & INT'L HUM. RTS. LAW 177, 178 (Kelly D. Askin & Doreen M. Koenig eds., 1999); see also Declaration on the Elimination of Violence Against Women, art. 4, U.N. GAOR, 3d Comm., 48th Sess., Res. 48/104, U.N. Doc. A/48/629 (1994) ("States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should . . . exercise due diligence to prevent, investigate, and . . . punish acts of violence against women, whether those acts are perpetrated by the State or by private persons." (emphasis added)).

302. Declaration on the Elimination of Violence Against Women, art. 4, U.N. GAOR, 3d Comm., 48th Sess., Res. 48/104, U.N. Doc. A/48/629 (1994).

against women.”³⁰³ The Protocol also requires ratifying states to “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women.”³⁰⁴ Although the Protocol explicitly values the role of tradition and custom in women’s lives, it does not allow custom to excuse violence or harmful practices.³⁰⁵

2. History and Future of State Involvement in Marriage

For feminists, the state has historically been an inconsistent ally; it is both the perpetrator of gender-based human rights violations and a potential source of remedies for those violations.³⁰⁶ Although claiming that the family is a private realm into which the state will not intercede, states have routinely regulated family matters.³⁰⁷ In exposing the flaws of the public/private dichotomy, many feminists have noted that states selectively intervene in family relations when it benefits the state to do so.³⁰⁸

Historically, colonial authorities and the indigenous male elites with whom they colluded manipulated marriage using taxes and selective criminal prosecution in ways that inspire skepticism toward state regulation of marriage. Colonial authorities and many of the traditional leaders who collaborated with them sought to manipulate indigenous marriage for a variety of reasons. In Belgian Africa, for example, colonial authorities sought to elevate the status of women by discouraging polygamy.³⁰⁹ To this end, the colonial authorities imposed a “polygamy tax” under which “men with more than one wife were obliged to pay a supplementary tax for each wife beyond the first, from the second up to the thirtieth.”³¹⁰ Belgian colonial authorities later came to regret “liberating” women from polygamy, concluding that it was “better [to] keep women under the customary authority of polygamists, . . . than [to] let them run free and misguided into town and prostitution.”³¹¹ Concern over prostitution, in fact, led Belgian colonial authorities to impose a tax on single urban women.³¹²

303. Protocol on the Rights of Women, *supra* note 294, art. 4.

304. *Id.* art. 5.

305. Bond, *Gender, Discourse*, *supra* note 12 (describing in detail the potential impact of the Protocol).

306. Romany, *supra* note 300, at 99-100.

307. Fineman, *supra* note 2, at 34 (“Reproduction clearly entails important societal interests . . . [T]he state interest in children continues to be used to justify state regulatory interest in the marital family.”).

308. CHARLESWORTH & CHINKIN, *supra* note 298, at 57 (“[T]he state can devote some of its powers to centres of authority in the private sphere that may have no concern with the unequal position of women or indeed may have an interest in maintaining it, such as the family . . .”).

309. Nancy Rose Hunt, *Noise Over Camouflaged Polygamy, Colonial Morality Taxation and a Woman-Naming Crisis in Belgian Africa*, in READINGS IN GENDER IN AFRICA 53, 54 (Andrea Cornwall, ed. 2005).

310. *Id.*

311. *Id.*

312. *Id.* at 56.

British colonial authorities and traditional leaders within British colonies also provided incentives to marry. In Ghana, for example, between 1929 and 1933, traditional leaders ordered the arrest of unmarried women over the age of fifteen.³¹³ The traditional leaders in Asante aimed to “encourage conjugal marriages among our womenfolk” in part to combat “women’s growing uncontrollability.”³¹⁴ Colonial authorities and male traditional leaders thus reinforced the view of marriage as a vehicle for social control over women. Taxes and criminal law became mechanisms to police the boundaries of marriage within the indigenous African population.

Although the colonial state’s history of marriage manipulation inspires skepticism among many feminists (myself included), rejecting the state as a potential agent of change is shortsighted. International and regional human rights instruments contemplate, and even require, an active role for the state in ensuring gender equality in marriage. With the expansion of state responsibility for violence against women, the international trend is toward greater state involvement in the promotion of equality within marriages rather than less.³¹⁵

Many feminists also recognize that the state itself is a perpetrator of violence against women as well as a potential source of redress for violations.³¹⁶ Although some skepticism of the state is warranted on that basis alone, minimizing or eliminating the state’s role in marriage regulation runs counter to the international human rights trend toward greater state responsibility for non-discrimination and violence within the so-called private domain of the family.

C. Equality Across Relationships: The State’s Role

1. Human Rights Framework

United Nations institutions have been slow to recognize same-sex couples’ right to marry.³¹⁷ Although human rights litigation may prove

313. Jean Allman, *Rounding Up Spinsters: Gender Chaos and Unmarried Women in Colonial Asante*, in “WICKED” WOMEN AND THE RECONFIGURATION OF GENDER IN AFRICA, *supra* note 228, at 130, 130.

314. *Id.* at 133 (noting that “the chiefs betrayed much concern about women’s growing uncontrollability, fondly recalling ‘the good old days of our ancestors . . . [when] no girl or woman dared to resist when given away in marriage to a suitor by her parents or relatives as is the case now.’” (citation omitted)).

315. In fairness, proponents of eliminating marriage as a legal category would likely argue that the state must continue to combat gender-based violence in the home through both civil and criminal laws that do not depend, for their efficacy, on marriage as a status. This is true for most civil protection order statutes in the United States, which extend to people in an intimate, but not necessarily conjugal, relationship.

316. See, e.g., Coomaraswamy & Kois, *supra* note 301, at 178-79.

317. See Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 862 (2008) (providing a comprehensive description of the international response to rights related to sexual orientation).

useful in compelling states to extend marriage rights to same-sex couples, recent jurisprudence from the European Court of Human Rights suggests that this outcome will take some time. In its June 24, 2010, judgment in *Schalk and Kopf v. Austria*, the Court ruled that Austria was not obligated to extend marriage rights to same-sex couples under Articles 8, 12, and 14 of the European Convention.³¹⁸ The Court suggested, however, that this conclusion might change when a sufficient number of European states recognized the right in their own domestic laws.³¹⁹ Article 12 of the Convention guarantees “men and women of marriageable age” the right to marry, “according to the national laws governing the exercise of this right.”³²⁰ Article 8 concerns the right to respect for private and family life, and Article 14 prohibits discrimination in the enjoyment of the rights set forth in the Convention.

A gay Austrian couple, Horst Michael Schalk and Johann Franz Kopf, challenged the Austrian government’s refusal to allow the couple to marry. In its analysis of Article 12, which guarantees “men and women” the right to marry, the Court noted that there is no consensus on same-sex marriage among European states.³²¹ Although it recognized that “the institution of marriage has undergone major social change since the adoption of the Convention,”³²² the Court noted that national governments were in the best position to assess the social and cultural meaning attached to marriage and to evaluate the expansion of marriage to include same-sex couples in a particular national context.³²³ As a result, the Court held that Article 12 imposed no obligation on Austria to afford same-sex couples the right to marry. In assessing the applicants’ discrimination claims under Articles 8 and 14, the Court concluded that Austria’s introduction of the Registered Partnership Act militated against a finding of discrimination.³²⁴

The Court did, however, appear to lay the foundation for a future finding to the contrary.³²⁵ Notably, the Court observed that it “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.”³²⁶ The Court implied that it would recognize a right to marry for same-sex couples when a European consensus emerged on the issue.³²⁷

318. *Schalk v. Austria*, App. No. 30141/04, ¶¶ 46, 58 (Eur. Ct. H.R. June 24, 2010).

319. *Id.*; see also Clive Baldwin, *The European Court’s Hidden But Hopeful Message on Same-Sex Marriage*, THE GUARDIAN (June 29, 2010, 1:45 PM), <http://www.guardian.co.uk/law/2010/jun/29/europe-rules-same-sex-marriage-austria> (“But for now the court has held back, hinting strongly that it will recognize the right to same-sex marriage, as a right under the convention, when a ‘European consensus’ exists . . .”).

320. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 12, Nov. 4, 1950, 213 U.N.T.S. 221, 234.

321. *Schalk*, App. No. 30141/04, ¶ 58.

322. *Id.*

323. *Id.* ¶¶ 60-61.

324. *Id.* ¶¶ 102-06.

325. See Baldwin, *supra* note 319.

326. *Schalk*, App. No. 30141/04, ¶ 61.

327. See Baldwin, *supra* note 319.

Some human rights organizations, in fact, suggest that *Schalk* represents an important partial victory for champions of marriage rights for same-sex couples.³²⁸

Consensus concerning the familial rights of same-sex couples will undoubtedly emerge more quickly in Europe than in Africa. Within Africa, South Africa stands alone in its official recognition of human rights related to sexual orientation.³²⁹ Robert Mugabe, President of Zimbabwe, has openly displayed hostility and animus toward gays and lesbians in that country.³³⁰ President Museveni of Uganda has similarly derided gays and lesbians in public comments.³³¹ Rights groups have accused government representatives in Zimbabwe, Namibia, Zambia, and Botswana, among others, of state-sponsored homophobia.³³² In May 2010, the Malawian government imprisoned two men that it accused of having a sexual relationship.³³³ LGBT activists throughout the region report being targeted for violence and harassment for their work on behalf of the LGBT community.³³⁴

The value of the human rights framework extends beyond strategic litigation. Human rights advocates will continue to use the human rights framework for public education campaigns designed to raise awareness about LGBT rights. These rights-based campaigns will, over time, increase tolerance and lay the foundation for more open dialogue concerning marriage rights for same-sex couples. Although this approach is susceptible to charges of incrementalism, it is the most politically feasible strategy given the reality of widespread, often officially sponsored homophobia in the region.

Civil society and the state must couple human rights awareness campaigns with long-term law reform efforts. These law reform efforts should build upon the current plural legal system, expanding the diversity of marriage options over time. When successful human rights advocacy and political will eventually coalesce, marriage options may be expanded to include marriage for same-sex couples in the region, as is the case in South Africa.

328. See, e.g., *id.*

329. See HUMAN RIGHTS WATCH, *supra* note 118, at 3 (distinguishing South Africa from the Southern African region as a whole).

330. Mugabe has been openly homophobic since 1995, justifying "his intolerance with the claim that homosexuality is 'un-African' [and] describing it as a disease 'coming from so-called developed nations.'" *Id.* at 1.

331. See Jonathan Clayton, *Same-Sex Marriages Given Blessing by South Africa*, THE TIMES, Dec. 2, 2005, at 47 (quoting Museveni as saying, "Look for homosexuals, lock them up and charge them. . . . God created Adam and Eve. I did not see God creating man and man.").

332. See, e.g., HUMAN RIGHTS WATCH, *supra* note 118, at 2.

333. Barry Bearak, *Gay Couple in Malawi Get Maximum Sentence of 14 Years in Prison*, N.Y. TIMES, May 21, 2010, at A6.

334. See generally HUMAN RIGHTS WATCH, *supra* note 118.

2. Levels of State Engagement

The state has an obligation to refrain from discrimination in the promotion of marriage and its attendant benefits.³³⁵ Over the last decade, activists and scholars have proposed a number of ways in which states might achieve equal treatment of intimate relationships. Three approaches have dominated the public discourse; each attempts to moderate state regulation to varying degrees.

a) Civil Unions for Same-Sex Couples

First, a state might decide to create a new category of relationships, such as civil partnerships. A state might create civil partnership status as a complement to marriage, affording same-sex couples the opportunity to register a civil partnership but not a marriage.³³⁶ The merits of this approach have been hotly debated in a number of countries.³³⁷ Opponents argue convincingly that recognition through a type of “separate-but-equal” scheme does little to combat the bias against same-sex partnerships.³³⁸ There is symbolic and expressive value in including same-sex unions within the legislative definition of marriage. In the words of two South African scholars who view civil partnerships as a poor substitute for marriage, “Within a multi-cultural society such as South Africa, marriage has diverse historical roots, a particular status, and a range of religious, social, and spiritual meanings, with varying forms of concomitant rituals.”³³⁹ As a result, there is significant expressive value in placing same-sex and opposite-sex unions on equal footing.

b) Elimination of Marriage as a Legal Status

Second, the state might remove itself from the marriage business altogether. Such a system would abolish marriage as a legal category and allow people to use contracts to define the parameters of their

335. For a thorough justification of this reasoning, see Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1380 (2010).

336. See Pierre De Vos & Jaco Barnard, *Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga*, 4 S. AFR. L.J. 795, 810 (2007).

337. See, e.g., Stephen Collins, *Same-Sex Couples to Get Legal Recognition Next Year*, IRISH TIMES, Nov. 1, 2007, at 1; Adam Wagner, *Has the Time Come for Gay Marriage in the UK?*, THE GUARDIAN (July 21, 2010, 7:24 PM), <http://www.guardian.co.uk/law/2010/jul/21/gay-marriage>.

338. See De Vos & Barnard, *supra* note 336, at 811 (suggesting that in South Africa, “the creation of an apartheid-style, separate ‘civil partnership’ for same-sex couples merely confirmed that the law did not consider their relationships equal in status and worthy of equal concern and respect”).

339. David Bilchitz & Melanie Judge, *For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa*, 23 S. AFR. J. HUM. RTS. 466, 472 (2007).

relationships.³⁴⁰ A handful of feminists and LGBT advocates in the global North, including most notably Martha Fineman, have advanced this approach. Those seeking to abolish marriage have argued that the institution is so heavily plagued by sexism and heterosexism that it is beyond redemption.³⁴¹

With its history of gender-based oppression, it is easy to see why some scholars would like to dismantle the marriage institution in the United States. The common law history of marriage in the United States demonstrates the patriarchal nature of the institution. As Fineman notes, the Reconstruction-era U.S. Supreme Court strictly defined the terms of the marital relationship:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.³⁴²

This view of marriage and women's roles within it led to the denial of women's property and contract rights.³⁴³ In more recent times, courts have relied on the sanctity of the institution of marriage to deny women legal remedies when they have been the victims of domestic violence and marital rape.³⁴⁴ "Seen through this lens, the virtues of doing away with marriage as a legal category are clear: it would protect freedom of expression, intimate association, and cultural pluralism while enhancing equality between and within intimate associations."³⁴⁵ Proponents also argue that eliminating marriage as a legal status would promote equality for those in same-sex relationships who are excluded from the institution in many parts of the world.³⁴⁶

According to Fineman, "[w]ith the recognition of equality between women and men, we assume parity in bargaining capacity on the part of individuals entering these relationships and no longer see a need for the

340. See, e.g., Nastich, *supra* note 2, at 165-66.

341. See, e.g., Fineman, *supra* note 2, at 29.

342. *Bradwell v. Illinois*, 83 U.S. 130 (1873) (enforcing the legal doctrine of coverture by holding that a state law preventing a woman from practicing law did not violate the Fourteenth Amendment).

343. Amanda L. Stubson, *Giving Victims a Voice: The Doctrine of Forfeiture by Wrongdoing as a Remedy to the Silencing Effect of Crawford*, 32 HAMLINE L. REV. 265, 290 (2009) ("Under coverture, a married woman had no property rights, and could not contract, sue, or be sued without the consent of her husband.").

344. See Nancy Kaymar Stafford, *Permission for Domestic Violence: Marital Rape in Ghanaian Marriage*, 29 WOMEN'S RTS. L. REP. 63, 64; Atinmo, *supra* note 152, at 82 ("Ultimately, women's injuries from domestic abuse reflect the effects of aggressive masculinity, but society feels that the sanctity of marriage is more important than a woman's physical safety.").

345. METZ, *supra* note 8, at 12.

346. See, e.g., Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 540-41 (2007).

protective intervention of the state.”³⁴⁷ Fineman proposes that people should regulate their own relationships through contract, noting that “[t]his means that sexual affiliates (formerly labeled husband and wife) would be regulated by the terms of their individualized agreements, with no special rules governing fairness and no unique review or monitoring of the negotiation process.”³⁴⁸ Fineman anticipates that “ameliorating doctrines would fill the void left by the abolition of this aspect of family law.”³⁴⁹

Assuming *arguendo* that Fineman’s premise is true in the United States, Commonwealth African women enjoy far less bargaining parity. In the context of Commonwealth Africa, feminists are struggling to achieve formal equality in many areas, making the assumption of bargaining parity inapposite. In this context, wide-scale, individualized bargaining over the rights and duties of intimate relationships as a substitute for state sanctioned marriage would subject many women to the vagaries of pronounced inequality in contract negotiation. Although formal, systematized marriage disadvantages women within the region, contract negotiations over marriage particularities would have a similar, or perhaps more deleterious, effect.

Perhaps uncontroversially, Fineman’s theory is a contextualized, situated one. It is informed by local geographic and socioeconomic realities and envisions a state that is both well-financed and well-functioning. It is fundamentally concerned with the excesses and overreaching of a strong state. In contrast, some states in Commonwealth Africa are weak states in terms of human rights enforcement and general administrative functioning. Central governments in the region lack the resources to provide the type of benefits, such as childcare and health insurance, which would theoretically facilitate implementation of Fineman’s model.

Other scholars have cautioned about the potential influence of illiberal proponents of deregulation. Linda McClain, for instance, describes how the proposal to eliminate the state’s role in the regulation of marriage has been co-opted in the U.S. by conservative proponents of religious autonomy.³⁵⁰ Similarly, within Commonwealth Africa, customary and religious leaders would likely welcome the opportunity to exercise exclusive jurisdiction over marriage. It would be unreasonable and contrary to the spirit of modern human rights jurisprudence, however, for the state to so abdicate its responsibility over the promotion of gender equality within the family to authorities with illiberal aims.³⁵¹

347. Fineman, *supra* note 2, at 53.

348. MARTHA FINEMAN, *THE AUTONOMY MYTH* 134 (2004).

349. *Id.* at 135.

350. See Linda McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship* 8 (Bos. Univ. Sch. of Law, Working Paper No. 10-14, 2010), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/2010.html>.

351. See generally, Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 *FORDHAM INT’L L.J.* 289 (2008).

Fineman's very recent scholarship suggests that she too has become wary of minimizing the role of the state because doing so privileges the value of autonomy over equality. She notes that "[i]n recent years in America the possibilities for a robust and expansive vision of equality seem to have eroded, worn away by the ascendancy of a narrow and impoverished understanding of autonomy."³⁵² This may call for more state intervention into the marriage institution: "If . . . we were to start our discussions of what is the proper relationship between state and individual with the primary objective being that of ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive state."³⁵³

Tamara Metz has also proposed dismantling marriage in favor of an "intimate caregiving union status."³⁵⁴ Metz argues that current state involvement with marriage is problematic on two primary grounds. First, she is concerned with "the role the state assumes when it wields final control over the public meaning and use of the marital label."³⁵⁵ Second, she objects to the use of marriage as the vehicle through which the state protects and supports caregiving.³⁵⁶

Yet Metz's first concern that the state is the sole authority for establishing the parameters and beneficiaries of marriage, while true in the United States, does not reflect the reality of the plural marriage systems in Commonwealth Africa. Within these systems, in which statutory law operates alongside customary and religious marriage law, the state plays a less significant role as the moral authority governing marriage. Traditional leaders and religious leaders play a role in facilitating and legitimizing non-statutory marriage regimes, thereby denying the state a monopoly on marriage.³⁵⁷ Traditional leaders have considerable leeway in defining and rewarding marriage.³⁵⁸ I have argued elsewhere, in fact, that traditional and religious leaders have too much authority to govern marriage, making women vulnerable to oppression and discrimination within the marital relationship.³⁵⁹

352. Martha Fineman, *The Vulnerable Subject and the Responsive State* 14 (2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1694740>.

353. *Id.* at 17.

354. METZ, *supra* note 8, at 114.

355. *Id.* at 115 (elaborating that "[w]hen government serves as the controlling public authority vis-à-vis marriage, it assumes the role of *ethical authority*, a role for which it neither is nor ought to be suited").

356. *Id.* at 128 (observing that "[w]hen marital status is the primary avenue for the flow of legal benefits, many families are left out or unduly disadvantaged").

357. See WOMEN & LAW IN S. AFR. RES. TRUST, IN SEARCH OF JUSTICE: WOMEN AND THE ADMINISTRATION OF JUSTICE IN MALAWI 20 (2000) ("Besides being involved in the contracting of the marriage, the marriage counselors are also intended to mediate between the spouses in cases of matrimonial trouble. Legally, the counselors are required and necessary by way of formality in relation to customary law marriages.").

358. See Christine Mary Venter, *The New South African Constitution: Facing the Challenges of Women's Rights and Cultural Rights in Post-Apartheid South Africa*, 21 J. LEGIS. 1, 3 (1995).

359. Bond, *Gender, Discourse*, *supra* note 12, at 559-60 (describing the extent of power that local tribal leaders possess, and their reluctance to embrace efforts to protect women's rights).

While Fineman and Metz's main arguments for marriage deregulation appears to rely on a particular notion of strong statehood, other aspects of their models may have more resonance in the African context. Metz's second major concern relates to the state's use of marriage to determine financial and other benefits of marriage.³⁶⁰ Like Fineman, she contends that marriage is a poor proxy for rewarding caretaking, and the task of defining marriage distracts from important, broader policy goals.³⁶¹ Fineman identifies the state's goals in marriage promotion and argues that those goals would be more easily accomplished through targeted, functional legislation. She asserts that the relationship between caregiver and dependent should replace the gendered, spousal dyad as the focus of the state's support within family law.³⁶² Commenting on Fineman's proposed focus on caregivers and dependents, Mary Lyndon Shanley observes that "[t]he kinds of measures that would foster autonomy for adults and enable them to provide for children in their care include health insurance, affordable and quality child care, child allowances of the kind common in Europe, flexible workplace hours, and paid parental leave for both men and women."³⁶³ Fineman asserts that the state must first meet the needs of dependents and their caregivers, and then adults can order their intimate lives through contract.³⁶⁴

Unlike concern about a state monopoly on marriage or assumptions about women's unfettered ability to negotiate contracts, Fineman and Metz's concerns surrounding caregiving have particular relevance to the African region. Fineman and Metz both suggest that the state could more directly serve the needs of caregivers by abandoning the use of marriage as a proxy. Within Commonwealth Africa, caregiving networks have often involved kinship ties that extend beyond the spousal dyad. The scourge of HIV/AIDS has caused a devastating number of children to be orphaned, complicating the landscape of family care.³⁶⁵ Grandparents and other family members have attempted to fill the gap left by parental AIDS deaths. The Commonwealth African state should recognize this diversity of caregiving and look for ways to support caregivers that reach beyond the marital relationship. Although Commonwealth African states have not historically had the resources to directly support parental – or other –

360. METZ, *supra* note 8, at 128 ("When marital status is the primary avenue for the flow of legal benefits, many families are left out or unduly disadvantaged.").

361. *Id.* ("The focus on marriage directs us toward the impossible task of defining marriage and distracts us from the matter of real import – how the state can foster the public welfare goals associated with intimate caregiving and stave off the potential inequalities that occur within its folds.").

362. Fineman, *supra* note 2, at 30 ("I argue that for all relevant and appropriate societal purposes, we do not need marriage and we should abolish it as a legal category, transferring the social and economic subsidies and privilege it now receives to a new family core connection – that of the caretaker-dependent.").

363. Shanley, *supra* note 23, at 201.

364. See Fineman, *supra* note 2.

365. Todres, *supra* note 32, at 424 (noting that "[t]he percentage of orphans in sub-Saharan Africa whose parents died because of AIDS increased from 3.5% in 1990 to 32% in 2001.").

caregivers, the increasing number of orphans in many countries will force states to consider policies that directly or indirectly support a diversity of caregivers.

The models proposed by Fineman, Metz, and others offer a compelling alternative to marriage as we know it. The models promise to promote equality by dismantling a historically patriarchal institution and attempting to ensure the well-being of vulnerable dependents. Although in many respects, the theory is inapplicable within the region, it offers important insights into state support for diverse forms of caregiving, an issue that has become increasingly relevant with the soaring number of parental AIDS deaths in Commonwealth Africa.

c) Marriage for All

Third, the state could extend marriage rights to all. Although the specific meanings and goals of marriage differ within communities and among individuals, marriage has expressive power.³⁶⁶ Marriage sends a cultural message, whether it is the private expression of love and commitment between two people or the public recognition of new linkages between two families. It is the expressive force of marriage that makes it difficult to tinker with the institution. The same expressive force and cultural meaning, however, suggests that the state has an opportunity to promote equality by making the institution accessible to same-sex couples.

Although the “marriage for all” approach has the benefit of placing same-sex and opposite-sex couples on equal footing, the approach fails to challenge the sexist aspects of marriage as an institution. In response to this concern, South Africa adopted a slightly modified approach to the extension of marriage rights to all. In the 2006 Civil Union Act, the South African Parliament created two categories of legally cognizable relationships.³⁶⁷ All couples, whether same-sex or opposite-sex, may choose to solemnize their relationship as either a marriage or a civil partnership.³⁶⁸ The Act, therefore, accomplishes dual objectives in that it “serves both to widen the ambit of marriage to include same-sex couples whilst de-centering marriage as the primary social form.”³⁶⁹ Not only do same-sex couples have the option to marry, but opposite-sex couples, who may reject marriage and the traditional sex roles it signifies, may elect a civil partnership.³⁷⁰

366. Fineman, *supra* note 2, at 37.

367. Bilchitz & Judge, *supra* note 339, at 479.

368. *Id.*

369. *Id.* at 476. There is, however, a conflict with the Marriage Act, which applies only to heterosexual couples and which is still on the books in South Africa. Failure to repeal this law upon passage of the Civil Union Act creates a troubling legal ambiguity. *Id.* at 487.

370. *Id.* at 486.

IV. PROMOTING POSITIVE INTERVENTION BY THE STATE

A. Strategies for Promoting Equality Within Relationships:
Establishing a Legislative Floor for Marriage Rights

I advocate preserving the basic structure of the plural marriage system, but I argue strongly for substantive changes to marriage law that apply across legal systems. States should enact legislation that establishes a floor for rights within marriage that applies whether the marriage was contracted according to statutory, customary, or religious law. Tanzania's Law of Marriage Act (LMA) provides an example of legislation that was designed to promote gender equality within marriage when it was enacted in 1971.³⁷¹ The LMA partially integrated the plural marriage law system in Tanzania by establishing statutory provisions that applied to all marriages regardless of whether the marriage was contracted according to statutory, customary, or religious law.

Tanzanian legal scholar Bart Rwezaura notes that one objective of the LMA was "to improve the status of married women and provide greater protection for children."³⁷² The LMA is limited in its reach and falls short of equality promotion in several areas.³⁷³ For its time, however, it was a progressive effort to standardize women's rights within marriage. "The Law of Marriage Act of 1971, which was hailed as a milestone in integrating personal laws and set Tanzania as a pioneer in Commonwealth Africa in gender rights, gives women some civil rights in marriage and divorce."³⁷⁴ The LMA, for example, established a minimum age for marriage, although the age differs for boys and girls.³⁷⁵ Significantly, the Act preserved the plural legal system for marriage but imposed core requirements that apply to all marriages and that were designed to improve the status of women within marriage.

South Africa's recent Recognition of Customary Marriages Act also seeks to apply certain statutory requirements to marriages contracted according to customary law.³⁷⁶ South African legal scholar Chuma Himonga notes that one primary goal of the "reform of customary marriage law was to bring this system of law in line with the Constitutional provisions on equality and non-discrimination and to create an equitable

371. See *infra* note 372 and accompanying text.

372. Bart Rwezaura, *Tanzania: Building a New Family Law Out of a Plural Legal System*, 33 U. LOUISVILLE J. FAM. L. 523, 526 (1995).

373. See Jennifer L. Rakstad, *The Progress of Tanzanian Women in the Law: Women in Legal Education, Legal Employment and Legal Reform*, 10 S. CAL. REV. L. & WOMEN'S STUD. 35, 91 (2000).

374. GENDER AND LAW: EAST AFRICA SPEAKS 54 (Gita Gopal and Maryam Salim, eds. 1998) (citation omitted).

375. CLARENCE KIPOBOTA AND SARAH LOUW, TANZANIA HUMAN RIGHTS REPORT 2008: PROGRESS THROUGH HUMAN RIGHTS 4 (2009).

376. See generally Penelope E. Andrews, "Big Love"? The Recognition of Customary Marriages in South Africa, 64 WASH. & LEE L. REV. 1483 (2007).

marital relationship for men and women.”³⁷⁷ The Act officially recognizes customary marriages and imposes requirements such as consent, recognition of women’s legal capacity, property rights for women in marriage, and protection for women in the dissolution of marriage.³⁷⁸ Among other things, “the Act has abolished the customary law method of dissolving marriages out of court by the families of the spouses and by other traditional institutions.”³⁷⁹

Tanzania and South Africa provide examples of important statutory interventions into the realm of customary and religious marriage law. Notably, neither statutory scheme attempts to abolish customary or religious marriage. An abolitionist approach would surely fail given the high rates of customary marriage in both countries. Abolition would also fail to preserve the positive, non-discriminatory aspects of culture and customary law.³⁸⁰ The legislative floor approach therefore attempts to create a minimum standard for women’s rights within marriage. It preserves the option of marrying according to customary law or religious law but stipulates specific ways in which such non-statutory marriages must conform to gender equality standards. One commentator, Ann Estin, has argued that courts and legislators should “allow individuals greater freedom to express their cultural or religious identity and negotiate the consequences of these commitments,” while at the same time “protect[ing] the rights of individuals to full membership and participation in the larger political community.”³⁸¹ The legislative floor model attempts to mediate these competing objectives in a way that is both pragmatic and achievable, as well as protective of gender equality and cultural identity.

Applying the “rights floor” approach, a state would have a strong justification for standardizing rights that pertain to bodily integrity. These standards for physical safety within marriage would apply across marriage systems. In other words, they would apply regardless of the type of marriage into which a couple entered. In practice, this standardization occurs through criminal laws prohibiting assault or family violence. Explicit recognition of these rights within the marriage law, however, might encourage prosecution and enforcement. The state would also be justified in providing civil remedies for intimate violence, regardless of the type of marriage into which a couple had entered.

Similarly, the state would be justified in standardizing, or integrating, financial rights within marriage and at its dissolution. The state, for example, could dictate property rights at divorce and apply those universal standards to civil, customary, and religious marriages. South Africa’s Registration of Customary Marriages Act applies a statutory property

377. Himonga, *supra* note 11, at 263.

378. *Id.* at 264-66.

379. *Id.* at 266.

380. See Bond, *Gender, Discourse*, *supra* note 12.

381. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 542 (2004).

rights standard to customary marriages.³⁸² The state could also standardize women's rights to inheritance, which vary significantly across countries and across marital systems. Although Tanzania integrated much of its marriage law through the LMA, it failed to standardize inheritance rights. Ghana, in contrast, has not integrated its marriage laws,³⁸³ but it passed a uniform intestate succession law in 1985.³⁸⁴ Human rights activists and others in Tanzania, including the Tanzanian Law Reform Commission, have pressed for an integrated intestate succession law similar to Ghana's.³⁸⁵ Parliament, however, has yet to enact an integrated inheritance law.

Finally, states would also have compelling reasons to impose some standard requirements on the entry into and exit from marriage. Here, the state is justified in regulating minimum age and voluntariness requirements for marriage. As with the other categories of rights, standard requirements for eligibility to marry would apply across marriage systems. Within this last category of rights, however, communities would be free to establish other requirements for a valid customary or religious marriage as long as those requirements did not infringe on gender equality rights.

B. Strategies for Promoting Equality Across Relationships: Increase Marriage "Menu" Options

The normative value of marriage is deeply entrenched in much of Commonwealth Africa. As a result, proposals to eliminate marriage as a legal status, which have arisen primarily in the global North, will have little purchase in contemporary Commonwealth Africa. Eliminating a statutory or civil law marriage option would simply result in an increase of customary or religious marriages, where illiberal norms sometimes function to subordinate women. I argue that rather than narrow the marriage options, the state should take the lead in increasing and eventually diversifying the available options.

The "menu" approach to marriage, in which couples may choose among a number of categories to solemnize their relationship, makes sense both as good policy and as a viable regional approach. In the plural legal

382. See *supra* notes 377-79 and accompanying text.

383. In Ghana in 1963, "a Bill on Uniform Marriage, Divorce and Inheritance rules was published but never enacted." Wanitzek, *supra* note 260, at 77.

384. Gordon R. Woodman, *Ghana Reforms the Law of Intestate Succession*, 29 J. AFR. L. 118, 118 (1985); see also, Kuenyehia, *supra* note 121, at 396. But see Fenrich & Higgins, *supra* note 5, at 295-340 (noting significant implementation problems with Ghana's intestate succession law).

385. LAW REFORM COMM'N OF TANZ., REPORT OF THE COMMISSION ON THE LAW OF SUCCESSION/INHERITANCE 84 (1995) ("A uniform law of Succession/Inheritance should be enacted in Tanzania, such a law should be moderated on the constitutional principles and guarantees to such an extent that it will recognize existing tribal, customary and religious differences but at the same time moderating those practices and procedures in the various tribal, religious and customary laws which are inconsistent with principles of justice and equity.").

systems of Commonwealth Africa, couples generally choose to be married under statutory, customary, or religious law. In this sense, the menu approach already exists. Over time, as human rights advocacy facilitates acceptance of marital equality, the menu could be expanded to include other options such as civil partnerships or same-sex marriage.

South Africa provides a blueprint for other countries in the region that achieve sufficient political momentum to expand the marriage menu options for same-sex couples. South Africa's Civil Union Act opens up marriage to same-sex couples at the same time that it provides a civil partnership option for anyone who objects to marriage based on its sexist and heterosexist history.³⁸⁶ As David Bilchitz and Melanie Judge remark:

[T]he achievement of the Civil Union Act is not that it guarantees any particular social result but rather that it opens up the space for two important goals to be achieved: first, the recognition of the equal status of lesbian and gay relationships; and secondly, the potential de-centering of marriage and the according of respect and recognition to a diverse range of familial forms.³⁸⁷

Human rights advocates outside of South Africa have begun to lay the foundation for broader acceptance of same-sex marriage, and for LGBT rights more generally. Although acknowledging the public attacks on LGBT communities in the region by national political leaders in Swaziland, Namibia, Kenya, Zambia, and Uganda,³⁸⁸ Marc Epprecht cautions against overstating the extent of homophobia within the region. Epprecht observes that in Commonwealth Africa, "blanket denunciations of state-sanctioned homophobia obscure some sophisticated cultural mechanisms that mitigate the impact of homophobic rhetoric, as well as some remarkable successes in achieving gay rights."³⁸⁹

Neville Hoad describes how anti-gay and nationalistic rhetoric combine to limit LGBT rights in the region.³⁹⁰ "Certain strands of African nationalism are explicit in their rejection of lesbian and gay citizenship rights This rejection is frequently legitimized as a defense of national, but more particularly racial, authenticity."³⁹¹ However, Hoad notes that some LGBT organizations in the region "have attempted to reclaim 'anthropological' traditions of African sexualities that are appropriable under the sign 'homosexuality.'"³⁹² He suggests that these groups have

386. Bilchitz & Judge, *supra* note 339, at 468.

387. *Id.* at 468.

388. MARC EPPRECHT, HUNGOCHANI: THE HISTORY OF A DISSIDENT SEXUALITY IN SOUTHERN AFRICA 4 (2004).

389. *Id.* at 6.

390. NEVILLE HOAD, AFRICAN INTIMACIES: RACE, HOMOSEXUALITY, AND GLOBALIZATION 75 (2006).

391. *Id.* at 75.

392. *Id.*

argued that homophobia, rather than homosexuality, is the “corrupting Western import.”³⁹³ According to this view, “the entrenchment of human rights discourse through at least fifty years of anti-apartheid nationalist struggle is firmly on the side of lesbian and gay South Africans.”³⁹⁴ Indeed, throughout the region, national advocacy groups, sometimes with the help of international organizations, are beginning to make incremental progress toward recognition of LGBT rights. This awareness-raising and human rights advocacy may, over time, create enough momentum in the region to expand marriage menu options to include marriage or civil partnerships for the LGBT population beyond South Africa, the regional leader in this area.

C. Resonant Custom as a Vehicle for Promoting Equality Norms

Commentators must resist the popular and overly simplistic view that characterizes marital relationships in Commonwealth Africa as regressive and those in the West as progressive. Although several important contemporary political leaders in the Commonwealth remain openly hostile to state recognition of the rights of same-sex individuals and resistant to the aggressive promotion of women’s rights within marriage, scholars and activists must interrogate customary law and practice to expose the ways in which tradition may actually *support* the re-envisioning of familial roles and responsibilities.

Despite the hurdles concerning social acceptance of gay and lesbian relationships, several features of family life in Commonwealth Africa may, in fact, lend support to eventual broadening of the marriage category. As discussed above, marriage in Commonwealth Africa has historically focused less on the relationship of two individual spouses.³⁹⁵ Instead, marriage marks the linkages between two families.³⁹⁶ Proposals advocating for state recognition of a range of relationships beyond conjugality, however, may ultimately resonate with some Commonwealth African cultural traditions that de-emphasize the conjugal relationship as the center of family life.

In addition, unconventional relationships in the region – both conjugal and non-conjugal – often developed as a response to social, cultural, and economic conditions.³⁹⁷ William Eskridge, for example, describes the

393. *Id.* (quoting one LGBT organization as stating that “[t]he minds of many of our Southern African political leaders remain thoroughly colonized by Victorian dogma which they now have the audacity to claim is the backbone of our African cultural heritage”).

394. *Id.* at 79-80.

395. Bélair, *supra* note 35, at 568.

396. See, e.g., Adjetey, *supra* note 34, at 1355.

397. See, e.g., Megan Vaughan, *Problems in the Reconstruction of the History of the Family as an Economic & Cultural Unit*, in READINGS IN GENDER IN AFRICA, *supra* note 309, at 119, 122 (“[C]hinjira in Southern Malawi, a relationship between two women formed independently of their respective families, tells us something about the effects of large-scale, long-term economic and social change It can be seen as a response not only to the constraints of ‘kinship’ . . . but also as a response to very new economic circumstances and different levels of

experience of a nineteenth century Nigerian woman of the Igbo ethnic group, who accumulated enough wealth to become a female husband to nine other women.³⁹⁸ Female sex workers in colonial-era Nairobi, developed pseudo-familial relationships designed to protect them financially.³⁹⁹ At times, sex workers did this by developing relationships of “‘blood brotherhood’ (*undugu wa kuchanjana*). . . . What usually happened was that a man and a woman came to an arrangement whereby afterwards they helped each other as brother and sister.”⁴⁰⁰ Other women in Nairobi, many of whom had accumulated property but had no children, adopted “woman to woman” marriages “to ensure heirs to inherit their wealth.”⁴⁰¹ In many cases, the motivation for this coupling was to keep property in the patrilineal line.⁴⁰²

Caretaking of children in Commonwealth Africa often involves extended family members.⁴⁰³ This accepted caretaking role for extended family members might make it easier for Commonwealth African states to recognize and value caretaking that goes beyond the marital relationship. With limited governmental resources in many of these countries, however, states are unlikely to provide financial incentives or otherwise compensate those extended family members for their role in caretaking.

Reform efforts that seek to establish connections between custom and proposed reforms are more likely to succeed than those that are perceived to be imports from the West. Aspects of customary law support a broader understanding of family, one that de-centers the spousal dyad. Rights activists must frame the discourse about reform around those areas of resonance.

CONCLUSION

The choice of an intimate partner is central to individual identity. Although states have historically limited legal recognition of intimate partners to opposite-sex marriage partners, there is a global shift toward recognition of a diversity of intimate relationships. Where states have been reluctant to acknowledge this shift, activists have called into question the state’s role in the regulation of intimate relationships.

I seek to geographically limit the application of this critique of the state’s role in marriage regulation. I advocate for the preservation of the

stratification.”).

398. Eskridge, *supra* note 17, at 1419-20.

399. See Janet M. Bujra, *Women ‘Entrepreneurs’ of Early Nairobi*, in READINGS IN GENDER IN AFRICA, *supra* note 309, at 123, 129.

400. *Id.*

401. *Id.* at 130.

402. *Id.*

403. See Bonthuys & Erlank, *supra* note 267, at 75 (“Many African children do not live with their parents, but with grandparents or other family members. Where parents are in full-time employment and do not have money to pay for day-care, children are often left in the care of relatives or neighbors, or even other children.”).

state's regulatory role in marriage in Commonwealth Africa for several reasons. First, the state has an obligation to promote equality within individual relationships. Within plural legal systems, removing the state from marriage regulation and thereby eliminating the civil marriage option would cede control over marriage to local communities. Because customary marriage law often discriminates against women, the absence of a statutory alternative harms women. Given the continued purchase of customary law in the region, states should thus retain the structure of the plural legal system and establish a statutory core of marriage rights that is applicable across all prevailing marriage regimes.

Second, the state must promote equality among intimate relationships, including same-sex relationships. Because the political climate in Commonwealth Africa remains largely hostile to the rights of the LGBT community, reform must be incremental. The plural legal system in most Commonwealth African countries allows couples to choose statutory, customary, and in some cases, religious law as the governing marriage law. This "menu" approach lends itself to a diversity of marriage options. States should build on the architecture of the plural legal system to increase "menu" options over time, including marriage options for same-sex couples.

Finally, the state should explore ways in which marriage reform reflects or builds upon existing value systems. Within the region, extended family systems have traditionally tended to de-center the spousal dyad. Moreover, the tragedy of HIV/AIDS deaths has required that extended family take on even greater care-taking roles within the family. Historically, individuals have entered into non-traditional relationships, some of them same-sex, for a variety of economic and social reasons. States and civil society should explore the areas of resonance between custom and reform efforts.

Marriage is a rapidly evolving global concept. Events of the last few months and years demonstrate that the definition of marriage is dynamic. As demonstrated by the example of Commonwealth Africa, theoretical critiques that call for a diminution or elimination of the role of the state in regulating marriage must be understood as context-specific. In much of the world, the state continues to have a vital role to play in promoting equality within and among relationships.